Supreme Court of the United States.

OCTOBER TERM, 1911.
No. 776.

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RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

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APPELLEE.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

This case is a consolidated one, consisting of two appeals involving identical issues, one appeal being from the United States Circuit Court of Appeals for the Sixth Circuit and the other from the United States Circuit Court for the Northern District of Ohio, Eastern Division. The suit in which these two appeals had their common origin was instituted in the United States Circuit Court for the Northern District of Ohio, Eastern Division, by the filing of a bill in equity by appellee herein, B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, in which bill the Railroad Com-

mission of Ohio, appellant herein, was made a defendant and in which bill complainant sought to enjoin the enforcement of a certain order theretofore made, entered and served by said Railroad Commission fixing and establishing a rate on so-called lake cargo coal transported by rail by complainant from the No. 8 coal field in Eastern Ohio to the Ports of Huron, Ohio, and Cleveland, Ohio, for trans-shipment by lake vessels. The Circuit Court allowed the injunction prayed for on the ground that the coal traffic in question constituted interstate commerce, the rate on which should be regulated by the Interstate Commerce Commission. Thereupon the Railroad Commission of Ohio perfected an appeal to the Circuit Court of Appeals for the Sixth Circuit, but being fearful, because of the uncertain meaning and dual nature of some of the jurisdictional averments in the complaint, that it might ultimately be held that said appeal should have been taken direct to the Supreme Court of the United States, an appeal was thereafter prosecuted direct to this Court, said direct appeal being case No. 505, on the docket of this Court for the October Term, 1911. Subsequent to the perfecting of said direct appeal the case as appealed to the Circuit Court of Appeals for the Sixth Circuit came on for hearing and said Circuit Court of Appeals held, over the objection of appellee, that it had jurisdiction on said appeal and affirmed the decree of the court below. The present case, No. 776, October Term, 1911, is an appeal from the decision of the Circuit Court of Appeals for the Sixth Circuit, with which appeal this Court on motion of appellant consolidated said direct appeal in case No. 505. Further, lest it might be held that this case was of such a nature that no appeal lay to this Court from the Circuit Court of

Appeals, a petition for Writ of Certiorari and brief in support thereof were filed herein some months ago, upon which petition this Court has as yet taken no action.

Upon whatever basis or theory this Court may assume jurisdiction, there is but one question made, and that is whether or not the Railroad Commission of Ohio, by its order, interfered with interstate commerce in such a manner as to contravene the Commerce Clause of the Constitution, more accurately described as Article 1, Section 8 of the Constitution of the United States.

In order that this Court may properly understand the question at issue, it is, therefore, necessary to define and describe the transportation affected by the order of the Railroad Commission of Ohio, together with the circumstances surrounding the same, and this we shall proceed to do as briefly as may be:

The so-called No. 8 coal field comprises an extensive deposit of bituminous coal, consisting of approximately two and one-half billion tons, underlying an area of about one-half million acres, and located in the counties of Belmont, Jefferson and Harrison, in the eastern part of the State of Ohio. The coal produced in this field is essentially a steam coal and is disposed of by the operators or producers therein generally speaking in three different ways which have given three different names to the coal thus disposed of, though all of the coal produced is of the same kind and quality, viz.: (1) Commercial coal, or that which is sold direct to the various mills and factories. (2) Railway fuel coal, or that which is disposed of to the railroads, principally for locomotive consumption. (3) Lake cargo coal, or that which is shipped by rail to the lower Lake Erie ports and there transferred to lake vessels on which the same is carried to various

points on the Great Lakes, where the same is used for manufacturing or railway purposes.

In addition to the above a considerable amount of this No. 8 coal is consumed by the lake vessels, such coal being known as "vessel fuel" coal. Of the coals just described, it is the third division or what is known as "lake cargo" coal, whose transportation from the No. 8 coal field in Eastern Ohio to the Ports of Huron and Cleveland, Ohio, is affected by the order of the Railroad Commission of Ohio.

This lake cargo coal is mined in connection with the railway fuel coal, the commercial coal and the vessel fuel coal above described, all these coals being of the same quality, and during the season of navigation is forwarded to the lake front in large quantities over The Wheeling & Lake Erie Railroad (Rec., p. 82), together with the surplus coal not needed for railway fuel or commercial purposes (Rec., pp. 90, 92).

When the coal operators or shippers determine to send certain cars of coal to the lake, these cars are marked "lake coal" (Rec., p. 84), and are shipped over the railroad operated by the appellee, under a contract of carriage which covers transportation only from one point in Ohio to other points in Ohio, to-wit, Huron and Cleveland, and the delivery at these other points to the shippers or their agents (Rec., pp. 83, 92).

The contents of most of the cars thus sent to the lake front are as a matter of fact ultimately carried by vessel to points in the Northwest in states other than Ohio (Rec., p. 94), and there marketed chiefly by the vendees of the No. 8 coal operators (Rec., pp. 85, 92).

The cars of No. 8 coal, billed to Cleveland and Huron as lake coal, whose contents do not ultimately reach

the Northwest in regular order are principally, (1) Those diverted to other destinations and uses *en route* Huron (Rec., pp. 84, 87). (2) Those interchanged by the operators with each other at Huron. (3) Those sold by the operators to each other at Huron (Rec., p. 93). (4) Those whose contents are used at Huron for vessel fuel (Rec., p. 82).

The rate established and published by The Wheeling & Lake Erie Railroad Company in connection with this traffic for several years has covered both the compulsory service of transportation and the independent voluntary service of unloading (Rec., p. 29), which latter service includes "trimming" or distributing the coal in the hold of the vessel by men or machinery (Rec., p. 78), though formerly the rate published included only the transportation up to the dock or unloading machine (Rec., p. 87).

Contracts for the sale of part of this lake coal are frequently made by the operators before the coal is mined (Rec., p. 84); contracts for the sale of other parts of this lake coal are made by the operators after this coal has arrived at Huron (Rec., pp. 86, 87, 89, 93).

Under some of these contracts delivery of the coal is to be made and is made f. o. b. vessel Huron and title to and risk in the property passes to the purchaser when the vessel is loaded with the coal (Rec., pp. 85, 87). Under others of these contracts delivery to the purchaser is to be made in the Northwest and title to the coal remains in the operator or shipper and the coal is delivered by The Wheeling & Lake Erie Railroad Company to said operator or shipper at Huron, Ohio, in vessels which the shipper charters or leases and over which he has absolute control (Rec., 85, 93).

When this lake coal is shipped from the mines it is not know whether any car or train of coal will be appropriated to existing or future contracts, as above distinguished, whether said coal will be delivered to the shippers or to the vendees of said shippers at Huron or Cleveland, as above explained, or to what point or points the contents of any car or train will ultimately be sent, or on what vessel or vessels the same may be carried (Rec., pp. 83, 84, 92).

Lake coal is shipped to Huron and Cleveland by the operators without regard to whether or not it is time for the delivery of coal under existing contracts (Rec., p. 90); that is, the operators in a way, anticipate demands for vessel shipments and estimate the amount which they will probably need at the lake front and ship the same to that point accordingly (Rec., p. 90), thus making the lake front a sort of assembling point for this coal. The coal for various reasons frequently stands on the cars in the yard at the lake front for quite a period of time. Seven days' free time are allowed the shippers, and if the coal is detained for a greater length of time than that, a demurrage charge of so much per day is imposed by the railroad company (Rec., p. 96). After the coal arrives in the yards at the lake front, it is subject to the order of the operator or shipper (Rec., pp. 83, 92), and when the order is given to the railroad to load a certain vessel with a certain kind of coal, no particular cars are designated in the order to the railroad, whose employes select the cars most readily accessible and load the same on the vessel (Rec., p. 84).

No car or cars of said lake coal are appropriated to any purchaser until after the selection of cars of a particular kind has been made from the general mass of

cars in the yard and loaded aboard vessel and until that time the coal in every case remains the property of the operator or shipper (Rec., p. 84).

No arrangement or understanding of any kind, expressed or implied, exists between the vessel carrier and the rail carrier. The Wheeling & Lake Erie Railroad Company and its Receiver do not even know what kind of an arrangement the shipper or purchaser makes with the water carrier, do not know what vessel is to take the coal, to what point any vessel is to take it or what is to be paid the vessel for carrying the coal (Rec., pp. 85, 86, 88, 93, 95).

The operator or shipper in behalf of himself or in behalf of his vendee, contracts separately for the vessel transportation under an agreement independent of and separate from his agreement with the Railroad Company (Rec., pp. 84, 85, 88), and makes said vessel contract sometimes before and sometimes after the coal to be carried by said vessels has arrived at the lake front (Rec., p. 92), and makes out the bill of lading for said vessel cargoes (Rec., p. 86).

The Railroad Commission of Ohio, after a full consideration of the matter, determined that it had jurisdiction to regulate the rate on the transportation of this coal to the lake front, and, therefore, made an order declaring the existing rate of 90c per ton unjust and unreasonable and directing that thereafter a rate of 70c per ton, which the Commission found to be a just and reasonable rate, should be charged for said services, and the question now before this Court is whether or not in making such an order the Railroad Commission of Ohio unconstitutionally interfered with commerce between the states.

EXTRACTS FROM RECORD.

In order that the Court may see at a glance certain parts of the record herein which support a number of the general statements contained in the foregoing "statement of the case," we give below certain excerpts from the record.

TESTIMONY OF MR. MAURER (coal operator in the No. 8 field), Record, p. 82:

"Mr. Hogsett: Now, Mr. Maurer, you ship coal from your mines to Huron and what other points on the Wheeling & Lake Erie?

Mr. Maurer: Only to Huron. We have shipped to Cleveland, but they are taking no coal there at this time.

Mr. Hogsett: That coal, or a part of it at least, is afterwards transported to various points on the great lakes?

Mr. Maurer: Part of it; part of it is used for vessel fuel.

Mr. Duncan: It takes another rate, doesn't it?

Mr. Maurer: Yes.

Mr. Hogsett: I wish you would explain to the Commission how your shipments from the mines of what is designated as lake coal, are made?

Mr. Maurer: On the Wheeling & Lake Erie the coal is weighed at the mine. The shipping clerk at the mine telephones the shipment into the office at Dillonvale, I mean the Wheeling & Lake Erie billing office at Dillonvale. Then in the evening, after the day's work is done, he makes out a mine report, one copy of which he sends to the agent at Dillonvale, one copy goes to Mr. Booth, of the Wheeling & Lake Erie, and one copy comes to our office.

Mr. Duncan: Who is it makes this report?

Mr. Maurer: The shipping clerk at the mine.

Mr. Duncan: Your shipping clerk?

Mr. Maurer: Yes, and this is a copy of the report that comes to our office, to Mr. Booth's office, and to the Wheeling & Lake Erie Agent at Dillonvale (producing same)."

Record, page 83:

"Mr. Hogsett: Now, go ahead with your answer.

Mr. Maurer: You refer to lake coal?

Mr. Hogsett: Yes.

Mr. Maurer: You understand that the lake coal referred to is lake coal that goes to Huron. It is consigned to the Glens Run Coal Company at Huron. If we have various grades of coal, we designate some of the office employes in whose name the coal is shipped. For example, if we were shipping mine run coal, we might call it S. B. Cooledge coal, or if we were shipping inch and a quarter lump, we might ship it to C. E. Sullivan in care of the Glens Run Coal Company, the name being for the purpose of designating the different grades of coal, and when we desire this coal loaded, we would notify the Wheeling & Lake Erie to load a certain vessel with C. E. Sullivan's coal, or Glens Run Coal or S. B. Cooledge coal, and that would simply indicate the grade of coal that was to be loaded on the vessel.

Commissioner Hughes: Can they be mixed?

Mr. Maurer: They can be mixed if we wanted to, but ordinarily we try to get a complete cargo on one grade of coal.

Mr. Hogsett: *At the time this coal is shipped from the mine does any person know where the ultimate destination of that coal is beyond Huron?*

Mr. Maurer: *We do not.*"

* * * * * * *

Record, page 84:

"Mr. Maurer: *When the coal leaves the mine it is simply marked 'Lake coal' and is consigned to Huron. At the time of shipment we do not know what boat will take it or to what point it will go, or whether en route part of it may not be reconsigned for some other purpose, or whether part of the coal will be used for fueling boats. That is no distinct car moved to any particular place or to any particular ultimate destination.*

Mr. Hogsett: Other than Huron?

Mr. Maurer: Other than Huron. I may say when a boat is loaded we do not designate what cars shall be loaded on the boat, but the railroad company goes out and picks up sufficient cars of that grade of coal to load the boat.

Commissioner Hughes: Is this coal all subject to reconsignment at any time after it leaves the mines; that is do you hold that right or power to reconsign the coal?

Mr. Maurer: The coal all belongs to the Glens Run Coal Company after it arrives at Huron.

Commissioner Hughes: And it is subject to reconsignment at any time.

Mr. Maurer: Subject to reconsignment.

Mr. Duncan: I do not think the witness understands the question of the Commissioner.

Mr. Maurer: I certainly do."

* * * * * * *

Record, page 85:

"Mr. Hogsett: Right in that connection, Mr. Maurer, *let me ask you whether or not there is any portion of that coal delivered to the purchasers f. o. b. vessel at Huron?*

Mr. Maurer: *Practically all delivered to the purchasers f. o. b. vessel at Huron,* although you may make a price at the other end, but as far as our shipments are concerned, we nearly always make them f. o. b. Huron or Cleveland.

Mr. Hogsett: Then where is it delivered f. o. b. vessel at Huron, those orders are orders given to the vessel owners?

Mr. Maurer: Yes; we call it a charter confirmation.

Mr. Hogsett: You do that for the purchaser of your coal?

Mr. Maurer: Yes; we do that for the purchaser of the coal. We charter the boats. We sometimes agree in selling the coal that we will take care of the charter. That is ordinarily the case that we will

take care of the furnishing of vessels and the chartering.

Mr. Hogsett: You mean by furnishing the vessel making the arrangement with the vessel owner?

Mr. Maurer: Yes.

Mr. Hogsett: For the use of the vessel to ship the cargo in?

Mr. Maurer: Yes; to ship the cargo in.

* * * * * * *

Mr. Hogsett: *Who, if anything, does the rail shipment have to do with, or what connection has the rail shipment with the water movement?*

Mr. Maurer: *Absolutely none whatever.*

Mr. Hogsett: *What relation is there, if any, between the rail carrier and the water carrier?*

Mr. Maurer: *None whatever.*

Mr. Hogsett: *They are under a separate contract entirely?*

Mr. Maurer: *Yes.*

Mr. Maurer: If the Commission will let me go on, I can explain the whole transaction. After the vessel is loaded sometimes the Wheeling & Lake Erie call up and notify us that the boat has cleared and has been loaded with so many tons of coal, but ordinarily we wait until we get a report of this kind (producing same) from the dock superintendent at Huron showing the boat, the date she was loaded and the number of cars and the tonnage.

Mr. Duncan: Are you offering that in evidence?

Mr. Hogsett: We will offer it.

Mr. Maurer: Upon the receipt of that notice usually the first thing to do is to insure the cargo. *Then we make out a bill of lading in this form* (producing same) *showing the destination, showing the name of the boat, showing the number of tons and the kind of coal, the rate of freight, consigned by ourselves as the consignor.*

Mr. Hogsett: The lake freight, you mean?

Mr. Maurer: Yes; the lake freight. Then we mail this bill of lading to the consignee at Ashland or Duluth, as the case may be, mailing him two or

three copies of the bill of lading, one of which he hands to the captain of the boat on his arrival there, and on that bill of lading the captain collects the freight. Sometimes that is done at the other end and sometimes at this end.

Commissioner Hughes: *Is the coal that you land on the dock there always sold before you land it?*

Mr. Maurer: *No; it may be shipped and sold afterwards. When anybody wants a certain amount of coal we take it out of the bunch.* There may be three or four or five hundred cars of coal there, and somebody calls up and says, 'We want five hundred of this' or 'six hundred of that grade of coal.'

Commissioner Hughes: That coal then is subject to reconsignment?

Mr. Maurer: Yes.

Commissioner Hughes: And may be sold after it is delivered on the dock?

Mr. Maurer: Part of it may be sold. Sometimes we have a bunch sold beforehand."

* * * * * * *

Record, page 87:

"Commissioner Gothlan: When the tariff formerly read f. o. b. dock, did the consignee then get a loading cargo?

Mr. Maurer: On some of the roads it is f. o. b. dock now.

Commissioner Gothlan: Who pays the loading charge, the shipper or the consignee?

Mr. Maurer: On the Pennsylvania road in Cleveland we pay the loading charge. Then at the end of the season all the charges of the dock company are turned over to Mr. Greist, the auditor of the Pennsylvania Company, who goes over them and O. K.'s them, then the dock company rebates to us whatever the difference is between the figures we pay and the figures Mr. Greist adopts. They run from probably 3½ cents per ton up to 6 cents.

Commissioner Gothlan: That is when the rate reads f. o. b. docks?

Mr. Maurer: Yes. Some of those docks are leased by the railroad companies to other parties who operate the docks. And in a case of that kind we pay the dock companies and ordinarily the railroad company dictate how much they shall charge.

Mr. Duncan: That is, they reimburse the shippers what is presumed to be an equitable profit made out of the operation of the dock?

Mr. Maurer: Yes.

* * * * * * *

Mr. Hogsett: Now, Mr. Maurer, *you may state whether or not you dispose or sell any of this coal after it has been taken to Huron?*

Mr. Maurer: *We dispose of a great deal of it after it has been taken to Huron".*

* * * * * * *

Record, page 89:

"Mr. Hogsett: That is the way some of your coal is disposed of?

Mr. Maurer: Yes.

Mr. Hogsett: Some portion of it is sold during the season and delivered from the coal that you have accumulated or assembled at Huron?

Mr. Maurer: We estimate, as I said before, the tonnage. When I say tonnage that does not mean the tonnage we sell, but the tonnage we figure we will be able to ship and be able to dispose of. This tonnage may not be over two-thirds sold, but we simply figure what we will probably sell and we have the coal; we cover sufficient coal to take care of that.

Mr. Hogsett: That is merely an estimate of what you may be able to sell during the season?

Mr. Maurer: Merely an estimate.

Mr. Hogsett: Then your shipments to Huron, the assembling point of your coal, is based upon what you estimate you may be able to dispose of during the season?

Mr. Maurer: Yes, sir.

Commissioner Gothlan: Going back for a minute, there is one point the commission is not clear

on. *I believe you stated you shipped to the port right along whether you have orders or not?*

Mr. Maurer: *We always keep a quantity of coal on the dock provided we have any lake shipments whatever.*

Mr. Arnold: That is you have the cars on the dock?

Mr. Maurer: We keep the cars on dock or substantially on the dock; they are along the line of the railroad some place.

Commissioner Gothlan: *Briefly what is the reason you ship that way instead of waiting until you have orders for the coal?*

Mr. Maurer: *In order to have the coal. It is a large quantity ordinarily that you sell at one time.* For example a boat of ten thousand tons' capacity—an order for ten thousand tons would require a boat of that capacity. To accumulate that much coal and take care of your business unless you had a very large mine would mean three or four weeks before you could accumulate it.

Commissioner Gothlan: *You anticipate that?*

Mr. Maurer: *Yes, we anticipate that. And we ship that what we term our surplus coal.* For example, we are running today and we have ten cars left over, and if we had no consignee in Ohio or other points that surplus would go to the lakes to await orders for shipment up the lakes. But you understand we have orders. We have a certain tonnage sold all the time.

Mr. Arnold: Still quite often such shipments were made when there are no sales for lake shipment at all?

Mr. Maurer: Yes. Simply to get rid of the coal, without the sign of an order."

Record, page 72:

"Mr. Duncan: Now, going back to this transportation of coal from the number eight district to the northwest territory, as I understand you, some of your coal proceeds from the mine without being

sold or before you have made a contract of sale?

Mr. Maurer: Sometimes—quite frequently, yes, sir.

Mr. Duncan: But the estimate that has governed your contract with the transportation company is presumed to cover what in your judgment as a coal man think will be your lake shipment for that year, providing you can get the transportation companies to contract up that high.

Mr. Maurer: If you will put the horse at the other end of the cart, you will have it right.

Mr. Duncan: I will put it the other way then.

Mr. Maurer: *This year we have shipped* 25,000 *tons to the lakes before we had any vessel contract, and that is done very frequently.*"

Testimony of Mr. Osborne (coal operator in the number 8 field), Record, p. 91:

"Mr. Hogsett: State to the Commission how that is done?

Mr. Osborne: For the sake of handling our coal with the least possible trouble and expense to the railroad we take some of our office men and while—we perhaps do it a little different from some of the rest, because we ship a great deal of Pennsylvania coal and other Ohio coals to the lake front, and we will take one man, if you please, and consign him to a certain port—take Lorain. We will send, say S. H. Robbins, who will take all of those grades of coal consigned to that point. He will take lump, run of mine, nut or slack, whichever it may be. When we order the boats we will order—give notice to the railroad that, for instance the Hiawatha will be for loading about such a date. Sometimes it is a little shorter than that time and sometimes it overruns—depends upon the speed of the unloading of the boat; and tell them that S. H. Robbins for three-quarter, and they will get that coal ready—giving them sufficient time to run it down to the docks, so that they can handle the coal at the best possible

operation for them and the least delay to the boat possible.

* * * * * * *

Mr. Hogsett: State those conditions.

Mr. Osborne: We take our coal—in the first place we fill up our mines with orders that we may have to deliver—of rail orders. *Then the surplus of those different grades of coal we may order to the lake front, and it is just about on the same line as pouring in from four or five different mines, different streams into a tub, and then, as we want a cargo of coal, we take an order out of that tub—a dipper full of whatever we want for the boat and the freight we pay to the lake front, and the vessel arrangements we make either by direct contract with the vessel concerned or we take a chance—what I mean by a chance, we keep out a certain percentage of our coal that is not contracted with any boat line and then we utilize a spot boat. For instance, that tub is getting full. The railroad company is going to shut off that coal running in there. So if we can get a spot boat, we rush it out and dip it out and let it go on.*

Mr. Hogsett: When this coal is shipped from the mines it is consigned, as you have stated, to some person in the employ of your company?

Mr. Osborne: *Be consigned to one of our employes with the understanding that the railroad company that it is our coal when we pay the freight.*

Mr. Hogsett: *At the time it is shipped from the mines does your company know where any particular car load or train load of coal will finally go?*

Mr. Osborne: *Absolutely no; absolutely not.* Unless it would be some time that there was a boat at the dock and a shortage of coal, then we would be after the railroad to rush that coal; that is a very exceptional case now, because there is plenty of coal at the lake front.

Mr. Hogsett: This coal is delievred to the purchaser, your purchaser, where, usually?

Mr. Osborne: When we purchase coal?

Mr. Hogsett: No, to the purchaser.

Mr. Osborne: Well, we do that any way the fellow will take it; give him any kind of medicine he wants on it. The coal is sold very largely f. o. b. boat at the lake front and that is all the basic price is, your coal f. o. b. at the lake front. Sometimes we will sell a man a block of coal at the lake front and he will request us to take a charter. We will take a chance on it or we may contract his coal.

Mr. Hogsett: Does it ever occur that your company purchases from another company coal that it has assembled or accumulated at the lake front, either Huron or Cleveland or those other ports?

Mr. Osborne: Yes, we have purchased coal at the lake front—purchased from different roads, among them the Wheeling & Lake Erie. I think we purchased some this spring from the Wheeling & Lake Erie at the lake front, number eight field coal.

Mr. Hogsett: That is you mean you purchased from the Wheeling & Lake Erie shippers?

Mr. Osborne: Yes, sir; Wheeling & Lake Erie road shippers.

* * * * * * *

Mr. Hogsett: Was that coal that had been shipped to the lake port?

Mr. Osborne: That had been shipped to the lake port?

Mr. Hogsett: Had it been sold when it was shipped?

Mr. Osborne: No, sir; they solicited us to take it, and we bought it at a very cheap price, an inducement to move it.

Mr. Hogsett: How much was there of that, Mr. Osborne, do you remember now?

Mr. Osborne: My recollection when they called up they had about five thousand tons and we told them if they would increase the cargo up to the point that we could get a boat for it, I think in the neighborhood of six to seven thousand tons, we would take it.

Mr. Hogsett: Now, Mr. Osborne in the shipments of this coal from the mines and in the shipments subsequently made by boat I will ask you to *state whether or not there is any connection at all between the rail carriage and the water carriage?*

* * * * * * *

Mr. Osborne: *There is no connection whatever. It is absolutely our coal. We pay the freight rates, the lake freight and make our own vessel arrangement and everything.*"

* * * * * * *

Record, page 94:

"Mr. Duncan: Now what you say that you do not know where the coal is to go that comes from the mine you mean you do not know to what point in the northwest each particular car of coal that is sent up to this bucket or tub at the lakes is to go?

Mr. Osborne: Either that or train load.

Mr. Duncan: Or train loads?

Mr. Osborne: Yes, sir.

Mr. Duncan: But you are pouring it all into the tub?

Mr. Osborne: Sure.

Mr. Duncan: To be taken out?

Mr. Osborne: Yes.

Mr. Duncan: And distributed in the northwest?

Mr. Osborne: To be taken to our dock or some other places on some other order that may come in.

Mr. Duncan: It does not of necessity go to the northwest, does it?

Mr. Osborne: No, no.

Mr. Duncan: Well, all of the coal that goes in there that takes the lake rate goes to the northwest, doesn't it?

Mr. Osborne: No, some of it goes to Detroit, some up along the river; some over into Canada —wherever we can get an order. Some of it we divert and we use locally.

Mr. Duncan: You pay the local rate if you divert it?

Mr. Osborne: Yes, and take your demurrage charges, too.

Mr. Arnold: Go to the Islands in Lake Erie—

Mr. Osborne: No—Kelley's Island you mean?

Mr. Arnold: Yes.

Mr. Osborne: I have none of that order.

Mr. Arnold: If any of that coal was sent from Huron to Kelly's Island it would take the same lake rate?

Mr. Osborne: Sure, if it would go into the river and be sunk it would take the same rate.

Mr. Arnold: I mean for shipping from lake ports to other points in Ohio it would still take the lake rate?

Mr. Osborne: Yes, any point in Ohio.

Mr. Arnold: That is all."

Testimony of B. A. Worthington (Receiver of Wheeling & Lake Erie Railroad Company), Record, p. 94:

"Mr. Hogsett: Mr. Worthington, has the Wheeling & Lake Erie Railroad Company, or you, as Receiver of that company, any contract or arrangement for the transportation of this lake coal with any lake carrier?

* * * * * * *

Mr. Worthington: No contract excepting the tariff rate of ninety cents f. o. b. vessel.

Mr. Hogsettt: Is that with the lake carriers?

Mr. Worthington: No, that is with the shipper. The shipper furnishes the boat into which we load the coal.

Mr. Hogsett: *I am asking you whether or not you have any contract with the lake carrier?*

Mr. Worthington: *Not that I know of.*

Mr. Hogsett: Well, you are in the management and control of the property and you know what the contracts are, don't you?

Mr. Worthington: No; the shipper furnishes the boat and the shipper makes his own arrange-

ments for shipping coal by vessel to the lake and our tariff is ninety cents f. o. b. vessel, and when he gives us instructions, we load the coal onto the boat and he charters the boat or makes his own arrangements for shipping the coal up to the head of the lakes.

Mr. Hogsett: *There is no arrangement between your railroad and the lake carrier?*

Mr. Worthington: *Not directly.*

Mr. Duncan: I object to the form of the gentleman's question. I do not know whether he means a direct arrangement or an indirect arrangement.

Mr. Worthington: No direct arrangement.

Mr. Hogsett: What do you mean by "no direct arrangement"?

Mr. Worthington, Well, *if the fact that the shipper furnishes the boat and arrangements to contract for the boat is not an indirect arrangement, why we have no arrangement."*

TESTIMONY OF MR. TITUS (Assistant Superintendent of Wheeling & Lake Erie Railroad Company), Record, page 96:

"Mr. Maurer: Explain what the seven days' demurrage was, so that the Commission may understand it?

Mr. Titus: Well, the average was seven days.

Mr. Maurer: The average of what; explain it so that the Commission will understand it.

Mr. Titus: To make it short, if you loaded two hundred cars on a boat, some of those cars might have been delayed thirty days, and some of them twenty, and some of them five, and the average of of those two hundred cars was not to be over seven days; otherwise, there was a demurrage.

Mr. Maurer: That is, if you brought two hundred cars to the lake, and one hundred of them were loaded at the end of fourteen days and the other hundred got there the day they were loaded, there would be no demurrage?

Mr. Titus: None whatever.

Mr. Maurer: That made the average of seven days?

Mr. Titus: Yes.

rM. Maurer: What was the charge per car, Mr. Titus?

Mr. Titus: One dollar a day.

Mr. Maurer: And that one dollar was extra, beyond the rate?

Mr. Titus: Yes.

Mr. Maurer: For every day?

Mr. Titus: Yes."

SPECIFICATION OF ERRORS.

Briefly and generally stated the error complained of and relied on by appellant herein consists of the conclusions of the courts below that the transportation of the lake cargo coal in question constitutes interstate commerce over which the Railroad Commission of Ohio has no jurisdiction, and of the decree based on such conclusions made and entered by the United States Circuit Court for the Northern District of Ohio, Eastern Division and affirmed by the United States Circuit Court of Appeals for the Sixth Circuit, that the enforcement of the order of the Railroad Commmission of Ohio establishing the rate on that commerce be perpetually enjoined.

For exact reference, however, we state below the specifications of error made with respect to the decision and decree of each of the above named courts:

Assignment of Errors in the Circuit Court of the United States for the Northern District of Ohio, Eastern Disvision (Rec., p. 105).

Comes now the defendant, the Railroad Commission of Ohio, and files the following assignment of errors, upon which it will reply upon its prosecution of its appeal from the decree made by this

Honorable Court on the 25th day of June, 1910, in the above entitled cause, and says; that the findings and decree in said cause are erroneous and against the just rights of said defendant, for the following reasons:

1. That the court erred in its finding for the plaintiff on the issue joined with reference to the character of the commerce to which said lake cargo rate is applicable.

2. That the court erred in its finding that the lake cargo rate involved in this controversy applied only to coal transported from a point in the State of Ohio, to-wit: the Number Eight District to a point outside the state.

3. The court erred in finding that the Railroad Commission of Ohio has no power to prescribe the rate or rates to be charged by the complainant for the services rendered by said complainant in the transportation of said lake cargo coal.

4. Said court erred in not finding and holding, upon a consideration of all the evidence, that the movement or transportation of said Number Eight Lake coal from said mines in said Counties of Jefferson, Belmont and Harrison, all in the State of Ohio, to said City of Cleveland and to said village of Huron, both in the State of Ohio, was an intra state movement, and therefore, within the jurisdiction of the Railroad Commission of Ohio.

5. The court erred in ordering, adjudging and decreeing that said order of the Railroad Commission of Ohio made and entered on the 28th day of February, 1910, is void and of no effect.

6. Said court erred in enjoining and prohibiting the defendant railroad commission of Ohio from instituting, authorizing and directing any suit, action or actions for the purpose of putting its said order of February 28th, 1910, into effect or from enforcing the provisions of said order.

7. That said court erred in granting the prayer of the complainant in said suit and entering a final decree therein against this defendant.

Assignment of Errors in the United States Circuit Court of Appeals for the Sixth Circuit.

(Rec., p. 116.)

The appellant in the above entitled cause in connection with its petition for appeal herein, presents and files therewith this assignment of errors as to which matters and things it says that the decree entered herein on the 2nd day of May, A. D. 1911, is erroneous, to-wit:

First. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the finding of said Circuit Court for the Northern District of Ohio, Eastern Division that the commerce to which said lake cargo rate is applicable is interstate commerce.

Second. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the findings of said Circuit Court for the Northern District of Ohio, Eastern Division that said lake cargo rate applies only to coal transported from a point in the State of Ohio, to-wit, the Number Eight District, to a point outside of the State of Ohio.

Third. That said Circuit Court of Appeals for the Sixth Circuit erred in not finding and holding upon a consideration of all the evidence that the movement or transportation of said Number Eight lake coal from said mines in said counties of Jefferson, Belmont and Harrison, all in the State of Ohio, to said city of Cleveland and said Village of Huron, both in the State of Ohio, was an intrastate movement or transportation.

Fourth. That said Circuit Court of Appeals for the Sixth Circuit erred in holding and deciding that the Railroad Commission of Ohio has no power to prescribe the rate or rates to be charged for the services rendered in the transportation of said lake cargo coal.

Fifth. That said Circuit Court of Appeals for the Sixth Circuit erred in holding and deciding that said order of the Railroad Commission of Ohio, establishing rates for the movement or transportation of said lake cargo coal, is void and of no effect.

Sixth. That said Circuit Court of Appeals for the Sixth Circuit erred in not holding and deciding that said Railroad Commission of Ohio had power to prescribe the rate to be charged for services rendered in the transportation of said lake cargo coal and in not holding and deciding that said order of said Railroad Commission of Ohio is legal and binding on appellee herein.

Seventh. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the decree of the Circuit Court for the Northern District of Ohio, Eastern Division.

Eighth. That said Circuit Court of Appeals for the Sixth Circuit erred in not reversing the decree of the Circuit Court for the Northern District of Ohio, Eastern Division.

Ninth. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the decree of the Circuit Court for the Northern District of Ohio, Eastern Division, which said decree declared that said order of appellant entered on the 28th day of February, 1910, was void and of no effect.

Tenth. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the order of said Circuit Court for the Northern District of Ohio, Eastern Division, enjoining appellant from instituting, authorizing and directing any suit, action or actions for the purpose of putting said order of said appellant, made February 28, 1910, into effect.

BRIEF AND ARGUMENT.

THE ORDER OF THE RAILROAD COMMISSION OF OHIO DOES NOT CONSTITUTE AN UNCONSTITUTIONAL REGULATION OF INTERSTATE COMMERCE, FOR THE REASON THAT THE TRANSPORTATION AFFECTED BY THE RATE IS PURELY AN INTRASTATE MOVEMENT.

As shown by the foregoing statement there is a demand for coal in the region tributary to the upper ports on the Great Lakes. The Ohio coal operators desire to participate in supplying that demand by shipping coal up the lakes or by selling and delivering the same at the Lower Lake ports to those who desire to take it up the lakes themselves. To get this coal to the lake vessel requires a rail haul from the mines to the lake front. This rail service the appellee, among others, undertakes to perform. The rail service is absolutely independent of the water service and no vestige of any common arrangement between the rail and water carrier for a through or continuous service exists. The cargo coal is shipped in car load lots to the Lake Front, in a general and indeterminate manner, along with other coal destined to the points of trans-shipment without regard to what disposition of this coal shall be made on its arrival at those points. When ordered, the appellee unloads the cargo coal on a vessel designated by the shipper or by the consignee, delivers the lake fuel coal to the same or a different vessel, switches the commercial coal to the proper point and thereafter renders his bill to the shipper, charging one rate for hauling the cargo coal, another for the lake fuel coal and another for the commercial coal, the lowest charge being made for the cargo coal, which charge the Railroad Commission of Ohio found unrea-

sonable, no complaint having been made to that Commission as to the other rates. The service performed by the appellee in the transportation of lake cargo coal is under a tariff published by him and quoting a rate only to the Lower Lake Ports. The coal is billed only to those points and is there re-delivered to the shipper or his agents or vendees aboard a vessel, procured by the shipper or his agent or vendee, when for the first time any specific mass of coal is appropriated to any shipment beyond the State of Ohio, and even then the vessel load of coal may be ordered conveyed to whatsoever point the shipper or his vendee may desire, the rail carrier having nothing whatever to do with the situation or arrangement. The owners or purchasers of this coal by the foregoing procedure effect a distinct and independent transfer of the same from the mines to the lake front in anticipation of a second and different transportation by water which is to begin at the lake front and end in another state, and they also by the very provisions of their contract with the rail carriage arrange for a separate transportation local to the State of Ohio.

It is, therefore, contended by appellant herein that the transportation of the coal in question is an intra state movement, the regulation of the charge on which by the Railroad Commission of Ohio constitutes no unlawful interference with interstate commerce, notwithstanding the disclosed intention or independent arrangement of the shipper or his vendee to later convey the coal by water to another state and there dispose of the same.

The more important of the numerous decisions bearing most directly on this contention will now be taken up and discussed, for the most part, in chronological order.

The Daniel Ball, 10 Wall. (U. S.), 577 (1871), is per

haps the earliest case to which it is advisable to refer specifically in connection with the present discussion. At the time that case arose there was a United States statute which made it unlawful for a vessel to transport merchandise or passengers on the navigable waters of the United States without a Federal license. The Daniel Ball was a vessel operating without such a license on the navigable waters of the United States between two points in the State of Michigan and carrying goods, some of which were "marked for places in other states than Michigan" and some of which came from other states than Michigan. In an action for a violation of the license regulation it was ultimately held that the vessel was liable.

Of the correctness and soundness of this conclusion no one, so far as we can recall, has ever expressed the slightest doubt, yet because of certain language of which Mr. Justice Field made use in the opinion in that case it is probably safe to say that few cases decided by this Court have been more frequently discussed and referred to.

The language to which we refer is as follows:

> "There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce 'among the several States,' with foreign nations, and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States. *Gibbons vs. Ogden*, 9 Wheat., 194, 195. In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river

goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

With respect to the language just quoted it may be remarked, in the first place, that the question of whether or not the boat in question must procure a license did not depend upon whether or not any of the articles conveyed by it were in interstate commerce. To this point we shall refer later. In the second place, it may be observed that the language in question is such that if taken in one sense, every person who has ever thought on this subject will at once agree with what is said; while if the language is taken in another sense, many of the courts and legal writers disagree with it.

Cooke, Commerce Clause of the Federal Constitution, p. 55.

In other words, if the language above quoted means that whenever a commodity has been released into a channel of interstate commerce by the owner or posessor thereof under a complete arrangement for the uninterrupted movement of that commodity to another state, then all will agree that the commodity in question is an article of interstate commerce from the time it begins to move. If, on the other hand, that language means that whenever the owner or possessor of a commodity arranges for a preliminary movement thereof to another point in the same state, with the intention of ultimately transporting that same commodity under a new arrangement, as yet unmade, into another state, the commodity is from the beginning of the first movement an article of interstate commerce, then many of the courts have been and we are now unwilling to subscribe to such an interpretation of the language in question.

It is our position in this case that in order for a commodity to become an article of interstate commerce, it must have a prescribed destination beyond the state of its origin and that until it begins a movement to that definite and prescribed destination under an arrangement effected for that entire movement, the article in question does not become one of interstate commerce.

Now we have just stated that the language in question constituted a dictum and was uttered with respect to a question not necessary to be passed on in connection with the decision of the case under consideration. That this statement is true and that any vessel plying on the navigable waters of the United States is amenable to Federal regulation, regardless of the nature of its cargo, is now generally admitted and for a discussion of the proper basis of this case we again make reference to the treatise of Mr. Cooke at the page just referred to.

If any other authority than those referred to is necessary to support the proposition that Federal regulation over a vehicle traversing a highway of interstate commerce is independent of the nature of the contents of the vehicle, it is found in one of the very recent decisions of this Honorable Court.

Southern Railway Co. vs. United States, decided October 30, 1911.

This, as is well known, is a decision under the provisions of the so-called "Safety Appliance Act" of March 2, 1903, and in substance holds that a railroad which is operated as part of a through highway over which traffic is continually being moved from one state to another, must provide all of the cars operated on its railroad with the appliances called for by the Act, regardless of the character of the contents of the cars as to their inter- or intrastate nature.

Now, as was said with respect to the decision in The Daniel Ball case, so it should be observed with respect to the decision in the safety appliance case, that no other conclusion could be regarded as sound or as protecting interstate commerce or those engaged therein from the carelessness of the owners or operators whose vehicles frequented the highway.

But we call attention most emphatically to the fact that the decisions in these two cases—for it seems to us that the Safety Appliance case simply decided as to interstate rails what The Daniel Ball case long ago decided as to interstate waters—do not touch the real point at issue in the present case. These cases decided that regardless of the character of the article of commerce being conveyed, the conveyance in which the articles are transported is subject to Federal supervision, the reason

for such decisions being that thus only can the lives of those actually engaged in interstate transportation be properly protected. In the case which we are now discussing, however, the primary question is whether or not the coal under consideration is in interstate commerce on its preliminary movement to the lake front under a severable contract of carriage, or, stating the question in general, what is yet undecided by this Court is whether or not transportation as such which is separately arranged for between two points within the same state is subject to Federal regulation because another carrier under another contract is later to transport the commodity to another state.

Indeed, instead of militating against the contention of the appellant herein, we suggest that the recent Safety Appliance decision gives an added reason for holding that the rail carriage of the No. 8 lake cargo coal is intrastate commerce. Reference to the Safety Appliance Statutes discloses that the statute of 1901 imposed upon every carrier engaged in interstate commerce by railroad, the duty of equipping all trains, locomotives and *cars used* on its line of railroad "*in moving interstate traffic*," and that the statute of 1903 enlarged the scope of the former Act by declaring, among other things,that its provisions "should apply to *all trains*, locomotives, tenders, *cars*, and similar vehicles *used on any railroad engaged in interstate commerce* * * *." (Italics ours.)

As will be shown by cases discussed later herein, under the Safety Appliance Act of 1901 there has been a difference of opinion in the minds of the courts as to whether or not that Act applied to cars carrying articles on a bill of lading reading from one point to another in the same state, when the goods were in fact marked to

or bound to or from another state. Even by those decisions under the former statute which held that cars carrying such commodities must be equipped as required by the Federal statute, no great hardship or inconvenience was imposed on a small railroad whose termini were within the same state and whose traffic in goods originating in or ultimately destined for other states was small, for the reason that a limited number of cars could be set aside and dedicated to that particular use.

When we come, however, to extending the present Safety Appliance Statute to all of the cars and equipment of every railroad engaged in interstate commerce, it at once becomes apparent that the scope of Federal control would be extended to a surprising and unnecessary extent if it should be held that every local state railroad which occasionally carries on its rails, in the performance of its mandatory duty, commodities billed between two points in that state, but which have originally come from or are ultimately bound to another state, must provide for every article of its equipment in the manner prescribed by the Federal statute. It is obvious that under the present Safety Appliance Statute it will sooner or later become necessary for the courts to define what is a railroad engaged in interstate commence, and if any railroad which transports an article in interstate commerce is to be considered as a railroad engaged in interstate commerce, then it would seem that the courts should hesitate to hold that a local state railroad operated as just described must comply with the Federal statute. To so hold would require a narrow guage railroad whose termini were both within the State of Ohio, whose rolling stock, because of its guage, could not leave the local rails and which occasionally trans

ported between two points within the State of Ohio on a local bill of lading an original package of Milwaukee beer which it had received from The Baltimore and Ohio Railroad, which in turn had received the same from its northwestern connection at Chicago, to equip every appliance operated by it in the manner provided by the Safety Appliance Act. This, we submit, would be going too far, and we suggest that it would be more proper only to require such a railroad to conform to the Safety Appliance Act when by some sort of traffic or other through arrangement it has voluntarily made provision for a continuous haul from or to a point beyond the state of its actual operation.

In *Heiserman vs. Burlington Railroad Co.*, 63 Ia., 732 (1884), certain grain was shipped on a local rail carrier from one point in Iowa to another and delivered at the latter point to a connecting carrier to be transported by it to Milwaukee, Wisconsin.

The bill of lading of the initial carrier, however, bound it only to carry the grain to the second point within the state and limited its liability to that part of the journey, but showed on its face that the initial carrier was to deliver the grain to The Chicago, Milwaukee & St. Paul Railway Company at its junction point with the initial carrier within the State of Iowa, and that The Chicago, Milwaukee & St. Paul Railway Company was to transport the grain in question to Milwaukee. In an action to recover freight charges in excess of those established by the State Statute the court ruled that the carriage in question was intrastate and that, therefore, the requirements of the State Statute were binding, for the reason that the contract of the carrier was completely performed by the delivery of the grain to the connect-

ing carrier and that, therefore, the local law must govern, notwithstanding the fact that it was patent to all parties to the transaction that the ultimate destination of the grain was Milwaukee and notwithstanding the fact that the rate for the initial carriage was based upon that consideration. This case seems to us indistinguishable in principle from the one now before this Court.

In *Coe vs. Errol*, 116 U. S., 517 (1886), it was held that certain logs which had been cut in New Hampshire and drawn down to a stream in that State and placed therein for the purpose of later being floated down the same stream into the State of Maine were not, while lying in the stream preparatory to the final float, articles of interstate commerce, and were not, therefore, exempt from taxation by the local New Hampshire authorities, for the reason that the interstate trip had not yet been begun.

In the course of the opinion rendered in that case, Mr. Justice Bradley said:

> "There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have start-

ed on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction and liable to taxation there if not taxed by reason of their being intended for exportation, but taxed without any discrimination in the usual way and manner in which such property is taxed in the state.

"* * * such goods do not cease to be part of the general mass of the property in the state subject as such to its jurisdiction and taxation in the usual way *until they have been shipped or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey.*" (Italics ours.)

After considering the case of *The Daniel Ball*, 10 Wall., 565, the court continues:

"But this movement does not begin until the articles have been shipped or started for transportation from one state to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state its destination is not fixed and certain. It may be sold or otherwise disposed of within the state and never put in the course of transportation out of the state. *Carrying it from the farm or the forest to the depot is only an interior movement of the property entirely within the state* for he purpose it is true, but only for the purpose, of putting it into a course of exportation; *it is no part of the exportation itself. Until shipped or started on its final journey out of*

the state its exportation is a matter altogether in fieri and not at all a fixed and certain thing.''

Now, it is the contention of the appellant herein that just as carrying property from "the farm or the forest to the depot is only an interior movement," so carrying the property of the coal operators of Ohio from their mines to the Lower Lake Ports on various trains. under a contract providing only for the carriage of the coal to these Lower Lake Ports, when the coal is often not yet sold, when it is not known to what person any car load of coal will ultimately go, or even to what state it will go, and when it is not known whether the coal will be appropriated to existing or future contracts, or whether it will be sold f. o. b. the vessel at the Lower Lake Ports, or f. o. b. the dock at the Upper Lake Ports, and when it is known that the various units of shipment are yet to be mingled at the Lower Lake Ports in the State of Ohio into a cargo of coal on a vessel not yet determined upon, and with whose services the rail carrier has nothing whatever to do, is also a local interior movement of this coal to a common assembling point within the state of Ohio in anticipation of a separate interstate movement as yet not clearly determined upon and existing only in a general way in the mind of the shipper. To use the simple but striking simile of one of the coal operators, the Lower Lake Port is looked upon by the operators as a sort of tub into which flow the small streams of coal coming from the mines and out of which, as the tub approaches fullness dippers full are taken for the purpose of filling vessels which are to transport the coal to the Northwest.

That this coal, prior to the beginning of its final movement by vessel up the lakes would be subject to

taxation in the state of Ohio in the manner suggested in the opinion just quoted from the case of *Coe vs. Errol* is indicated by a decision from the Supreme Court of the State of Ohio.

Carrier vs. Gordon, 21 O. S., 605 (1871).

In the case just cited lumber had been purchased by a non-resident during the winter season and the same was lying upon the river's bank awaiting the opening of navigation for transportation without the state, and this lumber, the Supreme Court held, was taxable in the State of Ohio, notwithstanding the imminence of its movement to another state and the non-residence of its owner.

We anticipate that at this juncture, however, a distinction will be attempted between the two cases last discussed and the present one, because of the fact that the rate fixed by the Railroad Commission of Ohio was for a service which included the unloading of the coal by the rail carrier upon the lake vessel at the Lower Lake port. Let us, therefore, consider whether or not our case is different from what it would be if the rate fixed by the Railroad Commission of Ohio was for the transportation to the Lower Lake Port, exclusive of the unloading service. As is generally known, coal carried by water is usually transferred from the railroad car to the water carrier by means of gigantic unloading machines, which grasp an entire car of coal, elevate the same above the vessel and turn the contents thereof into the vessel. These unloading machines are almost universally constructed and owned by the rail carriers themselves—at least this is true of those along the Lower Lake Ports. In some instances the railroads, after constructing these unloading machines, lease them to

other parties (Rec., p. 87)—sometimes to the coal operators themselves—in which event, of course, the rate charged by the Railroad Company for hauling the coal is for its transportation only. Sometimes the Railroad Companies owning these machines operate them separately, charging the coal shippers a certain number of cents per ton for performing this voluntary service (Rec., p. 87), in which event two separate and distinct charges are made for the service performed by the Railroad Company, one a transportation charge for conveying the coal from the mines to the docks, and another an unloading charge for transferring the coal into the vessel. The method last referred to is the one pursued for instance by The Pennsylvania Company in hauling this very lake cargo coal from this same No. 8 coal field to the same Port of Cleveland, Ohio (Rec., p. 87). In the present case, however, The Wheeling & Lake Erie Railroad and its Receiver, for some years have published a tariff fixing a rate of 90c per ton f. o. b. the vessel for the service performed in both the transportation and the unloading of this lake cargo coal, it being generally understood that of this charge 85c was to take care of the transportation—that being the charge imposed for the same service by the other railroads—and 5c was to pay for the separate and voluntary service performed by the Railroad Company in the way of unloading this coal from the cars into the vessels. Formerly, however, The Wheeling and Lake Erie Railroad also separated the charge for transportation from that of unloading, publishing in the tariff only the transportation charge (Rec., p. 87).

Now, in view of the foregoing facts, as well as in view of the situation in general, we submit that what

ever may be the proper nature of the service rendered by appellee herein in conveying this coal from the mines to the lakes, the nature of that service is not changed by the fact that it at present elects to perform, in addition to the service of transportation, the work of unloading this coal. The Railroad Company, of course, can perform this common service for all of its lake coal shippers at a much less cost than each shipper could perform the same service for himself, and it is, therefore, an economic advantage to all concerned to have the Railroad Company perform this service and make out of it what profit it may. The service, of course, might with equal propriety be performed by a concern independent of both the coal purchasers and the Railroad Company, as elevator and storage services are frequently performed. The point, however, which we wish to make is that the nature of the rail transportation is not and cannot be changed because the carrier chooses, as an incident to that transportation, to perform the unloading service. Nothing, perhaps, illustrates this more forcefully than the facts above referred to, showing that one railroad elects to separate the transportation from the unloading charge, and another elects to make one charge for both services. Surely, it could not, with propriety, be held that in one case the service performed by the carrier constituted an interstate transportation and that in the other it did not. It would seem equally idle to take the position that the appellee herein had been engaged in intrastate service prior to the time when the rate quoted was changed from f. o. b. dock to f. o. b. vessel, but that since that time he had been engaged in performing an interstate service. It ought not to be possible for a carrier to change the

nature or character of a given service *by simply changing the form of its tariff*. The service performed by the rail carrier in unloading this coal is but an incident to that rail transportation, and we submit that the nature of the commerce in which the rail carrier is engaged does not depend and could not properly depend upon whether or not it unloads the coal at all or whether it unloads it into a huge stationary bin or into a lake going vessel.

We submit, therefore, that, when the Circuit Court of Appeals, in concluding that the service affected by the order of the Railroad Commission of Ohio was interstate transportation, relied upon the fact that that rate required the Railroad Company to unload the coal into vessels (Rec., p. 115), such reliance was not justified. The court of original jurisdiction seemed also to be strongly influenced by this fact (Rec., p. 100), and we submit that that court was equally misled to the extent that its conclusion was based upon the performance by the Railroad Company of this separate unloading service.

In *Chicago, etc., Ry. Co. vs. Becker*, 32 Fed. Rep., 849 (C. C. Minnesota, 1887), the question was as to the validity of a certain order of the Warehouse and Railroad Commission of the State of Minnesota governing certain switching charges within the city of Minneapolis. The switching service affected by the order of the Commission was "usually performed in and about the yards and terminal grounds of complainant, but in many cases required such cars to be moved and hauled to considerable distances outside of and beyond such yards and terminal grounds and over the track of complainant and of other Railroad Companies." The Railway Company sought to enjoin the enforcement of the order of the

Commission on the ground that it constituted an unlawful interference with Interstate Commerce and in support of its Bill of Complaint filed affidavits showing that the cars switched by the complainant in the majority of cases were loaded with goods and merchandise destined for points outside the State of Minnesota, and that three-fourths of the traffic affected by the order was interstate commerce.

The court, however, held that the order was proper and lawful and a part of the opinion reads thus (p. 854):

> "The underlying question presented is, does the order of the state commission regulate interstate commerce? I find no warrant for the claim advanced that it is an interference with, or regulation of, interstate commerce, and encroaches upon the powers of the federal government. It is true that the loaded cars switched contain freight to be transported to other states, or received from other states, as well as local freight for or from points within the state of Minnesota; but unless the switching service is performed by the complainant, and cars are transferred from a shipper's warehouse or mill to be transported out of the state over a line of railway other than its own, no charge is made. The case presented is this: In order to afford facilities to shippers, the complainant has constructed short lines of road, or side-tracks or switches, so called, from its yard or depot or main lines, running over and across the streets and highways to the various mills and manufacturing establishments in the city of Minneapolis; and its switches are so built as to enable it to take cars from the shippers at the mills, and deliver them to other lines of railway, or deliver cars to consignees received by it from other roads. When this service is performed, and the cars are to be transported from the city of Minneapolis over other roads, and when cars coming into that city over other roads are taken by the com-

plainant over its own switches, and delivered to other roads or to consignees, a charge of one dollar and fifty cents per car is exacted for this switching service rendered, which is claimed to be reasonable and just; * * *. This charge is not a part of the through rate fixed and determined beforehand, and has no reference to interstate shipment. *The transportation of cars over the switches from the warehouses or mills to the depot, or from the depot to these mills, can be regulated in many respects by the commissioners, and the rate for performing the service fixed by virtue of the police power of the state, in the same manner as the carriage by dray per load or distance is established for the public good.* And I see no difference in the principle to be applied in such cases, although, incidentally, they may be connected with interstate commerce. *The service is local, and there is nothing upon the face of the order of the commissioners indicating that it is intended to regulate interstate commerce. Even if it is conceded that this carrying of freight over the switches is an act of interstate commerce, it does not necessarily follow that the order of the commission affecting this traffic is in violation of the constitution of the United States. It is not every act that affects such commerce that amounts to a regulation of it; and this order fixing the price per car for service rendered, and to which the order applies, is not related to the contract for carrying the freight outside the limits of the state of Minnesota, and is not a part of it.*" (Italics ours.)

This case will be referred to later herein in connection with The Larabee Flour Mills cases.

In *Ex Parte Kochler, Receiver*, 30 Fed. Rep., 867 (C. C. D. Ore., 1887), the Receiver of a line of railroad propounded to the court which had appointed him the question as to whether or not the handling of certain traffic, consisting of goods and merchandise carried by rail from points in the interior of the State of Oregon

to the Port of Portland for further carriage by vessel to San Francisco, California, rendered him amenable to the provisions of the Interstate Commerce Act requiring reports to the Interstate Commerce Commission. The court ruled that the Receiver need not report to the Commission, because of the fact that there was no common arrangement between the rail and water carrier for a continuous movement from one state to another, but went on by way of dictum to say that both the railroad and the steamers were engaged in interstate commerce. The decision of the court in this case is undoubtedly correct, but the dictum is contrary to the contention of appellant herein, and will be referred to hereinafter.

In *Missouri, etc., Co. vs. Cape Girardeau, etc., R. R. Co.*, 1 I. C. C. Rep., 30 (1887), the complainant in order to show that the shipment of certain railroad ties was interstate commerce relied on the fact that after the ties had arrived at the destination to which they had been sent by the railroad, it intended to send them across the river into another state by boat. The Commission, however, ruled as follows, as shown by the head note of the case:

> "The fact that the owner of merchandise which is offered to a carrier for transportation from one point to another in the same state intends to have it further transported by a second carrier into another state, does not make such first transportation interstate commerce or render the carrier subject to the control of the commission in respect to it, *even though such first carrier may be informed of the ultimate destination of the merchandise.*" (Italics ours.)

In *New Jersey Fruit Exchange vs. Central R. R. of New Jersey*, 2 I. C. C. Rep., 142 (1888), peaches were shipped in cars from various points in the State of New

Jersey to Jersey City in the same state, and there delivered to the consignee, who took the same immediately to the City of New York for sale and distribution. The shipments from the various points in the State of New Jersey to Jersey City were held not to constitute interstate commerce, and, therefore, not within the jurisdiction of the Interstate Commerce Commission, though the commodity shipped was at all times intended for ultimate delivery and use in New York.

In *Cutting vs. Florida Ry., etc., Co.*, 46 Fed. Rep., 641 (C. C. N. D. Fla., 1891), certain orange growers in the State of Florida shipped their fruit from one point in that state to another point in the same state, consigned to their agents at the latter point for re-shipment, and these agents immediately forwarded the fruit to its destination in another state. In this case the court held that the shipment from the growers to the forwarding agent was interstate commerce, not subject to the control of the Florida Railway Commission. This early case is opposed to the contention of the appellant in this case, but for some years this decision has not been regarded as representing the law, because of contrary decisions by this Court.

1 *Drinker, Interstate Commerce Act*, p. 84.

In *Ft. Worth, etc., Ry. Co. vs. Whitehead*, 26 S. W. Rep., 172 (Tex. Civil Appeals, 1894), there was a suit to recover an overcharge on the shipment of cars of coal from Fort Worth to Decatur, both within the State of Texas. The defense was that the shipment was an interstate one and that, therefore, the carrier was not amenable to state regulations. The coal had in fact been shipped from Lehigh, Okla., under a bill of lading to Ft. Worth, Texas, *which bill of lading stated that the coal*

was for Decatur, but it did not appear that any common arrangement existed between the carriers which connected at Ft. Worth. Under these circumstances the court held that the shipment from Ft. Worth to Decatur was intrastate, and that, therefore, the state rates applied.

In *Houston Direct Navigation Company vs. Insurance Co. of North America,* 30 L. R. A., 713 (Tex. Supreme Court, 1895), certain cotton was shipped from Houston, Texas, to Galveston, Texas, on a bill of lading to Galveston only, though the ultimate destination of the cotton was New York City, and in certain litigation growing out of the destruction of the cotton by fire, the court held that the first part of the journey from Houston to Galveston constituted interstate commerce, and that, therefore, the Statutes of the State of Texas forbidding carriers to limit liability did not apply. This is another early case in which the decision is opposed to the position of appellant herein, but in view of the later decisions of the Supreme Court of Texas, which will be referred to hereinafter, this early case cannot be regarded as representing the law of that state.

In *Cincinnati, etc., R. R. Co. vs. Interstate Commerce Commission,* 162 U. S., 184 (1896), the question of the jurisdiction of the Interstate Commerce Commission under the long and short haul clause of the Interstate Commerce Act was involved in the case of a haul partly on the line of an intrastate road. This court held that the Commission had jurisdiction, because of the common arrangement of the interstate and intrastate carrier, as evidenced by the through bill of lading with divisional rates, but on page 192 of the report this court said:

"It may be true that the 'Georgia Railroad

Company' as a corporation of the State of Georgia, and whose entire road is within that State, may not be legally compelled to submit itself to the provisions of the act of Congress, even when carrying, between points in Georgia, freight that has been brought from another state. *It may be that if,* in the present case, *the goods* of the James & Mayer Buggy Company *had reached Atlanta, and* there and then, for the first time and independently of any existing arrangement with the railroad companies that had transported them thither, *the Georgia Railroad Company was asked to transport them,* whether to Augusta or to Social Circle, *that company could undertake such transportation free from the control of any supervision except that of the State of Georgia.* But when the Georgia Railroad Company enters into a carriage of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one State to another, and thus becomes amenable to the Federal act, in respect to such interstate commerce."

In *Minneapolis, etc., R. R. Co. vs. State of Minn.,* 186 U. S., 257 (1902), no question was made as to the jurisdiction of the State Railroad Commission or as to whether or not the commodity in question was interstate commerce, but the action of the State Railroad Commission in fixing the rates on hard and soft coal in car load lots shipped from Duluth to various points in the interior of the state was upheld. This coal in question had come from Pennsylvania by water on the Great Lakes to Duluth, and from there was being distributed throughout the State. The case is, therefore, the converse of the present one and involves exactly the same point as to jurisdiction as does the present one, and since this de-

cision affirms the decision in the State court (80 Minn., 191), it seems reasonable to infer that both of those courts were under the impression that the State Railroad Commission had jurisdiction in the premises.

In this same connection it seems proper to call attention to the fact that the Wisconsin Railroad Commission has lowered rates on lake coal shipped by rail from the City of Superior to points in the State of Wisconsin.

Noble vs. Chicago, St. P., etc., Ry. Co., 1 Wis. R. R. Com. Rep., 767 (1907).

Elbertson vs. Chicago & St. P., etc., Co., 2 Wis. R. R. Com. Rep., 593 (1908).

The case of *J. Rosenbaum Grain Co. vs. Chicago, etc., Ry. Co.*, 130 Fed. Rep., 46 (C. C. N. D. Tex., 1903), is sometimes cited as holding that a State Railroad Commission has no power to regulate so-called "proportional tariffs" on shipments between points in the same state which are to be re-shipped for export. An examination of the facts in this case, however, shows that the shipments in question originated "without the State of Texas" (p. 49), and that, therefore, the State Railroad Commission was clearly without jurisdiction. The language used in the opinion is undoubtedly sound as applied to the existing facts.

In *Diamond Match Co. vs. Village of Ontonagon*, 183 U. S., 82 (1903), we have a case very similar to that of *Coe vs. Errol*, discussed earlier herein, except that the Diamond Match case goes a little farther in holding that logs which have not only been cut but have been floated down a stream and its tributaries to a boom or sorting gap from which they are to be shipped by rail as needed to a point outside the state, are not, while awaiting de-

livery to the Railroad Company for such shipment the subject of interstate commerce, but on the contrary are proper subjects for state taxation.

In *People of New York vs. Knight*, 192 U. S., 21 (1904), a franchise tax imposed by the State of New York upon The Pennsylvania Railroad Company for carrying on a cab service wholly within the state for the purpose of conveying its passengers to and from its ferry landing in New York City, the charges for which were entirely separate from those exacted for railroad transportation, was held not to be an unconstitutional burden on interstate commerce, but a tax upon an independent local service preliminary or subsequent to any interstate transportation.

We quote the following from the opinion in that case (p. 25):

> "The contention of the Company is that this cab service is merely an extension, and therefore a part of, its interstate transportation; that it is not carrying on a cab business generally in the city of New York, but is merely furnishing the service to those who seek to take over its lines some interstate transportation, thus commencing the transportation from their houses instead of from the ferry landing. * * * that the character of the business remains unchanged, although individuals may avail themselves of this service who do not intend or have not received any interstate transportation, for they who thus use the service do so wrongfully and against the wish of the company * * *.
>
> "It is true that a passenger over the Pennsylvania Railroad to the city of New York does not, in one sense, fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint, the company's cab service is

simply one element in a continuous interstate transportation, and as such would be excluded from state, and be subject to national, control. The state may not tax for the privilege of doing an interstate commerce business. On the other hand, *the cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. The party receiving it owes no legal duty of crossing the state line.*

"* * * *Wherever a separation in fact exists between transportation service wholly within the state and that between the states, a like separation may be recognized between the control of the state and that of the nation* * * *.

"As we have seen, *the cab service is rendered wholly within the state, and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a state, it is presumably subject to state control. The burden is on him who asserts that, though actually within, it is legally outside, the state; and unless the interstate character is established, locality determines the question of jurisdiction.*" (Italics ours.)

In *United States vs. Geddes*, 131 Fed. Rep., 452 (C. C. A., 6th Circuit, 1904), the question was whether or not the Ohio River and Western Railway Company, a railroad whose termini were all within the State of Ohio, had violated the Safety Appliance Act, which then applied to "any common carrier engaged in interstate commerce," which "hauls or permits to be hauled or used on its line any car used in making interstate traffic," because of the fact that the Railway Company had hauled in a car from Summerfield, Ohio, to Bellaire, Ohio, 37 cases of eggs, destined for Pittsburg, Pa., and deliv

ered them at Bellaire to the Baltimore & Ohio road for shipment. The Circuit Court of Appeals for the 6th Circuit held that the Safety Appliance Act did not apply, since the carrier was not engaged in interstate commerce, because its contract of carriage was between points exclusively within the State of Ohio, and it had no arrangement with any other carrier for carriage to any point or points beyond the limits of the State of Ohio. The court, after considering various decisions, together with the Interstate Commerce Act and the Safety Appliance Act, makes use of the following language on page 456:

> "In the present case there was no through bill of lading, no through charge, no conventional division thereof among the carriers, and no arrangement for a continuous carriage or shipment, unless the method of transfer by which the receiving road assumed the payment of the charges of the delivering road constituted such an arrangement. If it did, then the only way a local road can escape participation in an arrangement for a continuous carriage or shipment of freight from one state to another is to refuse altogether to handle such freight; and it cannot do this, for, as common carrier, it is bound to receive and transport from one point to another on its line, freight offered it for transportation, regardless of the origin or destination of the freight * * *.
>
> "The defendant company did all it could to keep its business local. It limited its interest so far as it could, to the transportation of the freight over its own line. It made no arrangement with the Baltimore & Ohio for through carriage either way. It was interested in none. It shared in none. It was interested only in its own local charge, and whatever arrangement it made was with a view simply of securing this. *The fact that certain goods transported by it were marked for other states or re*

ceived from other states did not make it a party to any arrangement for their interstate transportation in either direction. The part it performed was purely local. The interstate portion of the transportation was performed by the Baltimore & Ohio. When it delivered the goods to that road, they were still in Ohio. They might have stopped there for aught it cared. It had made no arrangement for their transportation any further. And so with the goods it received from the Baltimore & Ohio. They were offered to it in Ohio, and it was a matter of indifference to it where they came from. It had been no party to their transportation into Ohio. It received them virtually as Ohio goods, and carried them from one point to another in the state.

"Taking the view that *the defendant road*, at the time of the acts complained of, *was not engaged in interstate commerce*, and that the cars which hauled the cases of eggs from Summerfield to Bellaire, and the coils of rope from Bellaire to Woodsfield, were not engaged in 'moving interstate traffic,' we affirm the judgment of the lower court." (Italics ours.)

The case just cited and quoted from is from the same Circuit Court of Appeals which decided the present case adversely to appellant, but we submit that both of these decisions cannot be correct. Later in this discussion we shall refer to the opinion of the Circuit Court of Appeals for the Sixth Circuit in the case now under consideration.

In *White vs. St. Louis, etc., Ry. Co.*, 86 S. W. Rep., 962 (Tex. Civ. App., 1905), it appears that a passenger was transported from Chicago to a point in Texas on three separate railroads, with separate transportation for each road. In some manner not shown by the record the passenger's baggage was checked through. The last carriage was exclusively within the State of Texas, on

which carriage the passenger's baggage was damaged. It was held that the last road was engaged in intrastate commerce in transporting the passenger and baggage, and that, therefore, the state statute forbidding the limitation by a carrier of its liability, applied.

In *United States vs. Colorado, etc., R. R. Co.*, 157 Fed. Rep., 321 (C. C. A., 8th Circ., 1907), we have a case directly opposed to the Geddes case, just cited as having been decided by the Circuit Court of Appeals for the Sixth Circuit. One or the other of these cases must, therefore, be wrong.

In *Larabee Flour Mills Company vs. Missouri, Pacific Railway Company*, 74 Kansas, 808 (1906), The Larabee Flour Mills Co. applied to the Supreme Court of Kansas for a writ of mandamus to compel the Missouri Pacific Railway Company to resume certain transfer or switching service between the mill of the plaintiff and the line of another railroad, to-wit, The Atchison, Topeka & Sante Fe. This service required the Missouri Pacific to take empty cars to the mill and bring loaded cars away from the mill over a transfer track connecting The Atchison, Topeka & Sante Fe with the Missouri Pacific, over about one mile of the main line of the Missouri Pacific and over a spur track extending from the main line of the Missouri Pacific to the mill. It appeared further that a large part of the flour contained in the loaded cars which were sent out by the mill was destined for points outside of the state of Kansas. The railroad defended the application for the Writ of Mandamus on the ground that the granting of such a Writ would result in an unlawful interference with interstate commerce. The Supreme Court of Kansas, however, after considering and quoting at length from the cases of *Coe vs. Er-*

rol and *Chicago, etc., Railway Company vs. Becker,* hereinbefore discussed, concluded that the switching or transfer service in question was an intrastate service and, therefore, allowed the Writ as prayed for.

On page 818 of the Report, the opinion reads as follows:

> "After a car has been loaded and returned to the transfer track the Sante Fe may for lawful reasons decline to receive it. If it does receive it *there is neither a consignee nor a destination for it until the mill company has given shipping directions.* The preliminary stage has still not been passed. The movement from the point of origin neces ary to interstate commerce not only has not begun, but may never begin. As remarked by Mr. Justice Bradley in the case of *Coe vs. Errol,* 'though intended for exportation, they may never be exported; the owner has a perfect right to change his mind,' the custody of the carrier is not impressed with the change which frees the goods from domestic control until after they have been finally released to it by the consignor for transportation to a destination fixed beyond the state line; and under the custom prevailing at Stafford this does not occur until the cars have been taken to the transfer track, received by the Sante Fe, and finally billed.
>
> "There is still another test which may be applied. The Missouri Pacific engine, for all practical and legal purposes, simply takes the place of the plaintiff's teams in moving flour from the mill to the Sante Fe. Its work is that of switching cars. The service is purely local. It is independently contracted for. It has no relation to the contract of carriage by virtue of which the freight is removed beyond the borders of the State. It has no relation to the ultimate destination of the cars handled. *It begins and ends before the destination of any car is fixed and is in fact nothing but a preliminary incident to the interstate journey.* This being true it is

subject to state control. *Pennsylvania Railroad Company vs. Knight*, 192 U. S., 21." (Italics ours.)

This case was taken to the Supreme Court of the United States on Writ of Error, and is found in the reports of that court as

Missouri Pacific Railway Company vs. Larabee Flour Mills Company, 211 U. S., 612 (1909),

and this honorable Court affirmed the judgment of the Supreme Court of Kansas. The majority opinion in this case was written by Mr. Justice Brewer, and it is therein said that the "case does not rest upon any distinction between interstate commerce and that wholly within the state," the majority of the court apparently taking the position that even assuming that the cars in question were in interstate commerce the State of Kansas nevertheless had the right to regulate the service affected by the writ of mandamus. Mr. Justice Holmes concurred in the majority opinion on the ground that the cars had not yet been appropriated to interstate commerce. Mr. Justice Moody wrote a dissenting opinion, in which he stated his inability to agree with the reasoning of the majority so far as it declared that it was proper for the State to regulate the transfer of the cars after the same had been appropriated to interstate commerce, but went on to say that it was quite possible to support the case upon the ground that the cars had not yet become subjects of interstate commerce, and if the decision had been put on that ground he should not dissent. Mr. Justice White concurred in the dissenting opinion of Mr. Justice Moody.

Considering now what may be inferred to briefly as the "switching cases," namely *The Chicago, etc., Railway Company vs. Becker*, hereinbefore cited, and *The*

Larabee Mills case in the State court of Kansas and in this Honorable Court, we suggest that it would be quite justifiable to uphold the order of the State Railroad Commission of Ohio in the present case on either of the two grounds upon which the state regulations were upheld in the switching cases, namely, either upon the ground that the movement of the cargo coal from the mines to the Lower Lake ports is an independent preliminary movement, not sufficient to impress the traffic with the character of interstate commerce, or upon the other ground that even assuming that the coal is an article of interstate commerce after it leaves the mines, the transportation to the Lower Lake Ports is local, and, therefore, a proper subject of regulation by the state authority.

In this connection had best be considered another case decided by the Supreme Court of Indiana in the same year the Larabee case was decided by this Honorable Court. It is not called a switching case, but extends the doctrine of the switching cases to the independent local haul of a particular commodity destined to another state.

In *Chicago, etc., Ry. Co. vs. Railroad Commission of Indiana*, 87 N. E. Rep., 1030, it appeared that several railroads intersected at Lafayette, Indiana, and that one L. owned a gravel quarry some miles distant from Lafayette, and that one of the intersecting railroads had a short line running out to the quarry and made a rate for taking the empty cars from the various intersecting lines out to the quarry and bringing loaded cars back from the quarry for shipment on these various lines to points without the state of Indiana. The Railroad Commission of Indiana found the rate imposed by the defendant rail

road company for this service excessive and ordered it reduced, from which order there was an appeal on the ground, among others, that the order constituted an unlawful interference with interstate commerce. The order of the Railroad Commission was upheld, however, the court holding that the service in question did not constitute interstate commerce.

The court, in addition to stating that the movement in question was a preliminary one, just as much so as if the gravel had been drawn by horses and wagons, also relied in particular upon the fact that no through bill of lading was issued by the defendant railroad, and that it was not liable for or concerned in the movement on the other railroads. The court on this last point cited and relied upon the then recent case of *Gulf, Colorado, etc., Railroad Co. vs. Texas*, 204 U. S., 403, to which we shall next refer.

In *Gulf, etc., Ry. Co. vs. State of Texas*, 204 U. S., 403 (1907), we have a comparatively recent decision of this Court. The facts in the case are somewhat involved, but in the main are as follows:

The Harroun Company, doing business in Kansas City, Mo., had contracted with parties in Hudson, So. Dak., for the purchase of two cars of corn, to be delivered at Texarkana, Tex., the shipper paying the freight. Later, the Hardin Company of Kansas City, Mo., contracted with Saylor & Burnett to sell the latter at Goldthwaite, Texas, two cars of corn. In order to fulfill the contract with Saylor & Burnett the Hardin Company purchased from the Harroun Company the corn which it already had *en route* from South Dakota to Texarkana. The *reason why* the Hardin Company purchased *corn to be delivered at Texarkana was* because

they could fulfill their contract with Saylor & Burnett at Goldthwaite at about one and a half cents per bushel *cheaper than* they could *if* they had had the corn *shipped direct to Goldthwaite, and at* the *time* the Hardin Company *purchased* the corn they *intended* that *it* should go to Saylor & Burnett and *should be shipped to Goldthwaite from Texarkana*, and that Company furnished the agent of the Harroun Company, in Texarkana, with blank bills of lading for forwarding the corn from Texarkana to Goldthwaite. These bills of lading were duly made out and the corn shipped from Texarkana to Goldthwaite, but on its arrival there the carrier demanded a sum in excess of the rate prescribed for that carriage by the State Railroad Commission. Suit was instituted against the defendant, who was the last of the connecting carriers, to recover the statutory penalty for extortion. The defense was that the last carriage was interstate and that therefore the regulations of the State Railroad Commission had no application. Mr. Justice Brewer, in the opening sentence of the opinion of the court, said:

> "The single question in the case is whether, as between Texarkana and Goldthwaite, this was an interstate shipment."

The Court, affirming the decision of the highest court of Texas (97 Tex., 274), held that this shipment was an intrastate shipment, and that therefore the rate established by the State Railroad Commission applied.

The headnote of this case reads as follows:

> "The intention or purpose of the owners of an interstate shipment of a carload of grain to forward such car from the original terminal point to another point in the same state does not make the shipment between such two points, when performed by

a connecting carrier to which the car was delivered by the original terminal carrier in obedience to the instructions of the owner, an interstate one, and, as such, exempt from the regulations of the state railroad commission."

And on page 412 of the report, the language of the opinion reads thus:

"The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the *transportation* is another thing, and *follows the contract of shipment*, until that is changed by the agreement of owner and carrier * * *. When the Hardin Company accepted the corn at Texarkana the transportation contracted for ended. The carrier was under no obligations to carry it further. It transferred the corn, in obedience to the demands of the owner * * *. *Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn was a matter immaterial so far as the completed transportation was concerned.*

"In this respect there is no difference between an interstate passenger, and an interstate transportation. If Hardin, for instance, had purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled, on his arrival at Texarkana, to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished, he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the state within which that carriage was to be made.

"The question may be looked at from another point of view. *Supposing a carload of goods was shipped from Goldthwaite to Texarkana under a bill of lading calling for only that transportation,*

and supposing that the laws of Texas required, subject to penalty, that such goods should be carried in a particular kind of car—can there be any doubt that the carrier would be subject to the penalty, although it should appear that the shipper intended, after the goods had reached Texarkana, *to forward them to some other place outside the state?* To state the question in other words—if the only contract of shipment was for local transportation, *would the state law* in respect to the mode of transportation *be set one side* by a Federal law in respect to interstate transportation, *on the ground that the shipper intended*, after the one contract of shipment had been completed, *to forward the goods to some place outside the state?*" (Italics ours.)

Few cases decided by this Court in recent years have been referred to more frequently in the same period of time than has the one just cited and quoted from. So commonly has it been referred to and discussed that it has acquired the brief sobriquet of "The Texarkana case," and whatever contrariety of opinion may have existed prior to the rendition of the decision in that case, the decision therein has been regarded, at least until quite recently, as establishing the doctrine, as phrased in the opinion rendered by Mr. Justice Brewer, that "*transportation * * * follows the contract of shipment * * *,*" so far as all transportation regulations are concerned; that the agreement for transportation between two points within the same state is local transportation, subject to state regulation, regardless of any subsequent or ultimate destination the commodity transported may have, and regardless of any other extraneous fact or condition disclosed or undisclosed pertaining to the shipment in question.

State courts and commissions and the Interstate Commerce Commission have interpreted this decision as

establishing the doctrine just stated, and after express reference to this decision and quotation from the opinion therein have followed it, in some instances changing former rulings, and the initial complaint herein which gave rise to the order whose validity is now in question was instituted before the Railroad Commission of Ohio in reliance upon the decision and opinion of this Court in the Texarkana case.

Some of the decisions of the courts and of the Interstate Commerce Commission which have followed and relied upon the ruling in the Texarkana case and have interpreted that case as above indicated will now be referred to.

In *Hope Cotton Oil Company vs. Texas Pacific Railway Company*, 12 I. C. C. Rep., 266 (1907), a former ruling of the Commission which had been questioned by the United States Circuit Court prior to the decision in the Texarkana case was reaffirmed on the basis of the decision of this Court in that case. The ruling made by the Interstate Commerce Commission was that a carrier had no right to refuse cotton seed at regular rates from Shreveport, Louisana, to Texarkana, Arkansas, though the carrier knew that the shipper intended to get delivery at the latter point for the purpose of re-shipping at the local rate from there to Hope in order to get a better rate by combining the local rates than by taking the through rates.

In *Laning-Harris Coal, etc., Company vs. Missouri Pacific Railway Company*, 13 I. C. C. Rep., 154 (1908), a car of coal was shipped by a mining company from Springfield, Illinois, to Kansas City, Missouri, and thence forwarded to Salina, Kansas, the sum of the two local rates amounting to $3.50, while the through rate

was $3.73. The carrier charged the shipper the latter rate. Held, that the mining company should have reparation, as the two shipments were local and the shipper was entitled to the benefit of the local rates, in view of the decision of the United States Supreme Court in the Texarkana case.

In *Kansas City, etc., Railway Company vs. Brooks,* 105 S. W. Rep., 93 (Ark., 1908), one Armstrong boarded a train at a point in the State of Arkansas, intending to go to a point in the State of Texas, and offered to pay his fare to a point in Arkansas near the Texas line and there to get a ticket to the point in Texas to which he wished to go ultimately, it appearing that the train stopped long enough at the intermediate point in Arkansas to enable Armstrong to get a ticket to his destination. In a suit to recover the state statutory penalty for the carrier's failure to accept his offer, the court held that Armstrong had a right to make such an offer for an intrastate carriage at intrastate rates for the first part of his journey. The opinion in this case also cites and expressly follows the Texarkana case and commenting upon the conduct of Armstrong in electing to make two separate and distinct parts of his journey, says on page 94:

> "He had the right to break the continuity of his journey if he so desired."

In connection with the case from Arkansas just stated, it should be observed that this case in following the Texarkana case overruled by necessary implication a former decision of the same court, to-wit, *Porter vs. St. Louis & Southeastern Railway Co.,* 95 S. W. Rep., 453 (Ark., 1906), in which last named case a shipper bought a car load of lime at Erin, Tennessee, which he wished

to transport to Stuttgart, Arkansas. He shipped it to Brinkley, Ark., and there reshipped it to Stuttgart, in order to take advantage of the local rates. It was held in that case that the last movement from Brinkley to Stuttgart was an interstate shipment upon which the shipper must pay the interstate rate. This earlier decision is, of course, diametrically opposed to the Brooks case, decided two years later and just stated, which latter case is precisely in point with the one now at bar, except that it involves the case of a passenger, while the present one involves the shipment of freight.

The case of *Augusta Brokerage Company vs. Central of Georgia Railway Company*, 62 So. Rep., 996 (Ga. 1908), involves a question of discrimination and the point was made that the discrimination complained of was not in reference to an intrastate shipment, since the complainant wanted the delivery made at his warehouse simply for the purpose of at once re-shipping the commodity to a point without the state. It was held, however, that the shipment in question was intrastate, since the *immediate destination* was within the state, the court saying:

> "The plaintiffs were avowedly buyers of cotton seed for South Carolina parties. It is admitted that the cotton seed they bought was intended ultimately to be shipped to South Carolina, and, presumably, their request that the car be placed at the side track at this warehouse was intended in some way to facilitate shipment to its ultimate destination in South Carolina. *But the intention of the consignee as to the future disposal of his property, by shipment over another line, under a new bill of lading, into another state, cannot change an intrastate shipment into an interstate shipment. The law is not dealing with the intention of the consign*

or, but solely with the relation of the railroad to the freight transported. A seller in Georgia might conduct with a buyer in South Carolina an interstate business as between themselves, but if the railroad refuses to carry beyond its own line and compels unloading at is terminus in Georgia, such business in its relation with the railroad is wholly intra state." (Italics ours.)

In *Kurtz vs. Pennsylvania Company*, 16 I. C. C. Rep., 410, it was contended by the defendant that inasmuch as the sum of the local rates from New Castle to Pittsburgh and from Pittsburgh to New York were less than the through rate from New Castle to New York it would be illegal for the defendant to permit the complainant to effect his through transportation by means of two local tickets.

In commenting upon this contention, the Commission says:

> "If, they say, the complainant *knowing that he is to make a through journey from New Castle (Pennsylvania), to New York*, purchases a local ticket for $1.00 to Pittsburgh and a local ticket from Pittsburgh for $10.50, for the purpose of thereby securing through transportation at $11.50, which is less than the published through rate, he is guilty of a violation of the Act to Regulate Commerce; and the defendants, if they knowingly permit this practice are equally guilty."

After referring at some length to a previous ruling of the Commission in which had been considered the right of a passenger intending to go from Charleston to Savannah, for which the through rate was $6.00 to purchase a ticket from Charleston to the state line for $3.00 and from the state line to Savannah for $2.00, the opinion continues as follows, on page 413:

> "Upon the other hand, this Commission has

stated in its administrative ruling, and now repeats, that a passenger may properly pay his fare from Charleston to the state line and again from the state line to Savannah, *although he thereby obtains through transportation between these points for less than the published through rate, and although he does so, knowing that he is to go from Charleston to Savannah and deliberately seeking this means of obtaining transportation at less than the through rate.*

"*The reason for this is that not the intent of the parties, but the actual transaction must be regarded, as was held by the United States Supreme Court in Gulf, Colorado & Sante Fe Railroad Company vs. Texas*, 204 U. S., 403." (Italics ours.)

In *Dobbs vs. Louisville, etc., Railroad Company*, 18 I. C. C. Rep., 210, the complainant shipped three car loads of canned peaches from Oakhurst, Georgia, to Marietta, Georgia, and from thence re-billed one car to Lexington, Kentucky, and two cars to Cincinnati, Ohio. The through rates from Oakhurst to Lexington were 58c per one hundred pounds, and 60c to Cincinnati. A commodity rate of 27c from Marietta to Lexington and Cincinnati was in effect. A local rate of 6c was in effect from Oakhurst to Marietta, thus making the combination rate 33c. The complainant, however, was compelled by the carrier to pay the full through rate on the cars in question and sought reparation on the basis of the rate from Marietta, claiming that the through rate from Oakhurst was unreasonable. The defendant railroad, however, contended that the movement from Oakhurst to Marietta was intrastate, and the rate from Marietta to destination was conceded to be reasonable. The Commission in sustaining the position of the railroad defendant, uses the following language:

"Complainant did not attempt to make a

through interstate shipment when tendering this freight to the carrier, and it expressly absolves the agents of the carrier from conniving for the purpose of defeating the through rate on canned goods. He states in this connection, 'the rates were given me, and the one from Oakhurst was so unreasonable that I took the best combination that I could make from them.' *By taking the course he did, complainant voluntarily adopted a movement and a rate applicable thereon which were intrastate in character. Gulf, Colorado & Santa Fe vs. Texas*, 204 *U. S.*, 403. *Moreover, separate contracts were made for the two movements; charges for the first movement were paid at Marietta and did not follow the shipments to destinations.*

Under the facts of record we find that the Commission is without jurisdiction of the movement from Oakhurst to Marietta, to which was applied and collected the separately established state rate, and as there is no allegation of unreasonableness as to the separately established interstae commodity rate from Marietta to destinations, the complaint will be dismissed, and it will be so ordered." (Italics ours.)

In *Texas & New Orleans Railroad Company vs. Sabine Tram Company*, 121 S. W. Rep., 256 (Tex. Civ. App. 1909), there was a suit by the Sabine Tram Company against the Railroad Company for the recovery of excessive freight charges and for the enforcement of the state statutory penalty for extortion.

The facts involved in the case were substantially as follows:

The Sabine Tram Company was a manufacturer of lumber in Texas. The Powell Company was engaged in buying lumber for export. Powell contracted with The Sabine Tram Company for certain car loads of lumber at a certain price f. o. b. cars at Sabine. The Sabine

Tram Company shipped the lumber, making out the bill of lading to the consignor, notify Powell. The way bills for the same were marked "for export," were endorsed by The Sabine Tram Company, who was the consignor, and sent to Powell.

On the arrival of the lumber at Sabine the agent of Powell directed the cars to be at once put on the dock about a quarter of a mile from the station, where the lumber was unloaded into the water by the ship's side. The carrier knew when the freight was collected that the lumber was to be shipped abroad. Ships were often chartered before the lumber left the mill and often waited at Sabine until the lumber should arrive, and the contracts of sale in Europe were often made before the lumber began to leave the mill and even before it had been purchased by Powell. The lumber would lie at Sabine until a ship should arrive to take it.

Powell, the purchaser for export, took out insurance on the lumber before the same arrived, so as to be in force from the time of arrival until the lumber should be carried safely to its final destination in Europe. Powell knew that all the lumber purchased was to go abroad, but did not know just where any car would go until its arrival in Sabine, and its inspection and classification there. The Sabine Tram Company supposed, from its general knowledge and from its understanding of the nature of the business which Powell conducted, that the lumber which it shipped was to go abroad, but it gave this matter no concern. The Sabine Tram Company paid the freight on the lumber shipped to Sabine. The principal defense to the suit was that the shipment in question was an interstate one.

The court held that this case was governed by the

Texarkana case, and that it was, therefore, not necessary to consider various conflicting earlier decisions of the courts of the state of Texas, and, consequently, ruled that the shipment in question was an intrastate one and that The Sabine Tram Company was entitled to a judgment. The opinion in this case is quite lengthy and quotes extensively from the opinion of the United States Supreme Court in the Texarkana case and applies the same step by step to the facts in the Sabine Tram case. The court interpreted the Texarkana case as deciding that the contract of carriage was alone to be looked to in determining the nature of the shipment, and said that the interstate shipment was not begun until the carriage to Sabine was ended, and that, therefore, the decision which was then rendered was in perfect accord with the decision in the case of *Coe vs. Erroll.* The court concludes its opinion on page 62 by stating that it is "utterly unreasonable" that the intention of the consignee should determine the character of the shipment and that if "allowing the terms of a shipping contract" to determine the nature of the shipment will place it in the power of an owner to control the matter, it can see no harm in this, nor any violation of the spirit or purpose of the Commerce Clause of the Federal Constitution.

The facts in this Sabine Tram Case bear a striking resemblance to those in the present case, not only as to the manner in which the lumber and coal are bought, sold and transported, but also in that the lumber is marked "for export" in the way bills in The Sabine Tram Case, just as the coal is marked "lake" in our case. We submit that the two cases are indistinguishable in principle.

It may be remarked in this connection that there are certain earlier decisions of the courts of Texas which

are, at least in spirit, contrary to the decision in the case just discussed, one of which has been referred to earlier herein, but in view of the decision just discussed, and in view of certain later ones next to be referred to, one of which is by the Supreme Court of the State of Texas, and all of which have been rendered since the decision in the Texarkana case and expressly refer to that case, it does not seem advisable or necessary to discuss or refer to the earlier cases.

The additional later cases just indicated are:

Texarkana, etc., Ry. Co. vs. Sabine Tram Co., 129 S. W. Rep., 198 (Tex. Civ. App. 1910).

Wood, etc., Co. vs. Galveston, etc., Co., 130 S. W. Rep., 857 (Tex. Civ. App. 1910).

Texas & Pacific Ry. Co. vs. Taylor, 126 S. W. Rep., 1117 (Tex. Supreme Court, 1910).

In the case last cited it was held that a state statute imposing a penalty for a refusal to furnish cars applied to a case in which a shipper intended to ship stock from one point to another in the State of Texas and then to ship the same to Mexico. The court held as follows, on page 1119 of the Report:

> "Taylor ordered cars in which to ship his stock to El Paso. The bill of lading bound The Texas & Pacific Railroad Company to carry the stock to El Paso and there deliver them to Taylor. The stock was carried to El Paso and there delivered to Taylor and by him shipped by another railroad to Mexico. *When the plaintiff in error delivered the stock to Taylor in El Paso the contract had been fully complied with and its liability terminated. This was purely and simply an intrastate shipment.*" (Italics ours.)

In *Wells-Higman Company vs. Grand Rapids, etc., Ry. Co.*, Interstate Commerce Commission, No. 2270, decided November 7, 1910, a shipper sought to recover an

overcharge on a car load shipment of baskets which had been made first from Metropolis, Illinois, to Chicago and thence to Lawton, Michigan. The Interstate Commerce Commission refused reparation, stating as follows:

> "The contract entered into with the Illinois Central for the intrastate transportation to Chicago, care of Pere Marquette at Riverdale, was duly discharged before the Interstate movement to Lawton commenced. *Gulf, Colorado & Santa Fe Ry. Co. vs. Texas*, 204 U. S., 403."

After citing and quoting from the case of *Coe vs. Errol*, the opinion continues:

> "Two separate and distinct movements, therefore, comprise this transportation from Metropolis to Lawton—an intrastate movement from Metropolis to Chicago and an interstate movement from Chicago to Lawton. Over the intrastate movement we have no jurisdiction."

In *Oregon Railroad & Navigation Co. vs. Campbell*, 180 Fed. Rep., 253 (C. C. Ore. 1910), certain barrels of sugar had been purchased in the state of California by Lang & Company of Portland, Oregon. This sugar was shipped and billed to Lang & Company and transported to Portland, Oregon, by a steamship not under common control or management with the railroad. At the time the sugar was bought and ordered sent to Portland by Lang & Company, that company intended to ship the sugar in question from Portland to other points within the State of Oregon. Upon the arrival of the sugar at Portland, Lang & Company took possession of the same and placed it in the warehouse, without removing the sugar from the original packages in which it had been transported from California to Oregon. Later this sugar was sold and shipped over the line of The Oregon

Railroad & Navigation Company to a party in Baker City, Oregon. Suit was brought against the Railroad Company for freight charges which it had exacted in excess of those established by the State Railroad Commission, and the defense was made that since Lang & Company had from the very beginning intended to send this sugar to some points within the state of Oregon other than Portland, and since the sugar at the time of the shipment from Portland to Baker City still remained in the original packages in which it had come from California, the Railroad Commission of the State of Oregon was without jurisdiction over the transportation in question.

The court, however, in reliance upon the Texarkana case held that the shipment in question was an intrastate one, and therefore, subject to the jurisdiction of the State Railroad Commission.

In discussing the contention that since under the doctrine of the so-called "original package" cases, the sugar in question must necessarily be regarded as an article of interstate commerce, the court uses the language to which we desire to direct attention when it says:

> "* * * it must be that a different principle applies to the carrier of freight than that which appertains to the importer of goods. An importer may insist that he has a right to sell goods that he has brought into a state from another state, while in the original packages, but it would not follow that a carrier has the right to treat those goods as interstate commerce so long as they remain in that condition unsold by the importer. *The carrier depends rather upon his contract of carriage and interstate traffic as to him depends upon whether he is called upon to transport from one state to another or to serve his patrons by transportation wholly within the limits of a state.*"

After quoting from the Texarkana case the opinion of the court continues as follows, as will be found on page 256 of the Report:

"The case turns upon the contract of shipment between the shipper and carrier and when that is at an end the shipper can claim nothing further as respects the property carried. It is then at the command of the owner and if he chooses to ship it again from one point to another in the state it becomes an intrastate shipment notwithstanding the owner may be dealing with an article of interstate commerce. For illustration, take the case of *Leisy vs. Hardin, supra;* where beer was shipped into Iowa in original packages, the owner could not be deprived of the right to sell the beer while it remained in original packages, because it was an article of interstate commerce. The shipment of the beer to him from another state was an interstate shipment. *When that shipment was at an end another carrier who might transport the beer to another point in the state of Iowa, could not claim that the shipment was interstate, because the article might be characterized interstate commerce in the hands of the owner. There must be and is a distinction between interstate commerce as it pertains to the article and interstate commerce as it pertains to transportation and carriage. The former depends upon the fact that it is an article of commerce—that is of barter and sale—between the states or with foreign countries, and the latter upon the fact that it is being transported from one state to another.* When the transportation ceases or comes to an end the shipment has lost its character as an interstate shipment and if the commodity is again moved it becomes an intrastate or interstate shipment according as it is moved to a point wholly within the state or a point without.

"I am constrained to the view that the case of *Gulf, Colorado & Santa Fe Railway Company vs.*

Texas, supra, is controlling in this, and I, therefore, hold that the Intervener is entitled to the rebate demanded in each of the three shipments specified. Let the decree be entered accordingly." (Italics ours.)

The italicized portion of the opinion just quoted refers to a matter to which we would direct the consideration of this Court, namely, that there may well be a distinction between an article of interstate commerce and an article in interstate transit, and that an article of interstate commerce when being transported from a point in a state to another point in the same state under an independent arrangement between the owner and the carrier may properly be regarded as in intrastate transportation, and its transportation, therefore, properly regulated by a state supervising body. Expressed otherwise the thought is that when commodities are conveyed by rail between two points in the same state under a contract of carriage for that transportation, the proper body to regulate that charge, at least in the absence of any action with respect to such matters by the Federal Congress, is the State regulating body. Such a method of regulation at once suggests itself as a simple and logical method of regulation and avoids the necessity of determining in every case, upon evidence often uncertain and sometimes concealed, whether or not a shipment tendered consists of articles of inter or intrastate commerce, for as suggested by the opinion last quoted from, if a state regulating body cannot fix the rate upon any article of interstate commerce, the importer of a box of furs from abroad or of a case of beer from another state, so long as the same are unsold or unbroken, can claim exemption from any rates estab

lished by a state, notwithstanding how frequently he may desire to transport the same between points in the same state, and the result would be the necessity for having on file with the Interstate Commerce Commission schedules of innumerable rates between innumerable points in the same state based upon innumerable contingencies. It has been the general understanding that to avoid this uncertain and chaotic state of affairs this court in the Texarkana case laid down the doctrine that so far as the regulation of the movement of traffic was concerned transportation should follow the contract of shipment. It has generally been supposed that the decision in the Texarkana case would have been the same had the shipment in question consisted of Canadian furs packed in shipping cases, instead of South Dakota wheat. If such supposition is correct, then we should have, and we think properly have, a case of the Railroad Commission of Texas regulating the charge for the intrastate transportation of an article of foreign commerce and, therefore, exempt from taxation by that same state.

If the above conclusion is correct then it may be properly urged that even if contrary to what has been argued herein this Court shall conclude that the lake cargo coal by virtue of its ultimate destination is an article of interstate commerce, the transportation of the same on a separate and distinct bill of lading from the coal fields to the Ports of Huron and Cleveland, without any common arrangement with the vessel carrier for a continuous carriage is an intrastate movement, purposely and rightfully made so by the contract between the owner and the carrier of the commodity and, therefore, subject to regulation by the Railroad Commission of Ohio.

In the Matter of Transportation by The Chesapeake & Ohio Railway Company, et al., Interstate Commerce Commission, No. 3863, decided June 12, 1911, the question presented to the Commission was as to the nature of certain shipments of lime by railroad and as to whether a common control, management or arrangement for continuous carriage or shipment from one state to another between the rail and water carrier existed. The shipments in question were from Eagle Mountain, Virginia, over the line of The Chesapeake & Ohio Railway Company, consigned to "J. B. Flora & Co., care Elizabeth City & Norfolk Steamship Company, Norfolk, Va.," it appearing that the carrier by water transported such lime from Norfolk, Va., to J. B. Flora & Co., at Elizabeth City, N. C. It appeared also that the shipments were billed and treated by the Railroad Company as local shipments to Norfolk, and were delivered there to the water carrier as the representative of the consignee upon payment of the rail carrier's charges up to that point. It appeared further that the water carrier acted as agent of the consignee, paid the charges of the rail carrier and transported the shipments to the destination indicated by the consignee. The Commission under the above state of facts concluded that the evidence disclosed "*a local intrastate shipment by railroad* under one bill of lading upon which the purely local rate should be applied and an interstate shipment by a water carrier upon another bill of lading, such water carrier being under no common control, management, or arrangement with the railroad," supporting its conclusion by quoting from that part of the opinion in the Texarkana case, which reads:

> "In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it has made, know whether it was bound to obey the state or Federal law, or obeying the former find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended transportation beyond that specified in the contract. It must be remembered that there is a no presumption that the transfer when commenced is to be continued beyond the state limits and the carrier ought to be able to depend upon the contract which it has made and must conform to the liability imposed by that contract."

As a result of the Commission's conclusion that the shipment in question was a local intrastate movement it stated that it would be proper for the rail carrier to carry out its offer to refund the amount of freight it had collected in excess of the local intrastate rate, and in further support of the understanding of the Commission that the bill of lading determined the nature of the shipment, the following paragraph was quoted from the opinion of this court in the so-called "Social Circle" case (162 U. S., 184):

> "All we wish to be understood to hold is that when goods shipped under a through bill of lading from a point in one state to a point in another are received in transit by a state common carrier under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the Act to Regulate Commerce."

So much for our consideration of the decisions rendered since and in reliance upon the decision of this court in the so-called Texarkana case, more properly described as *Gulf, Colorado & Santa Fe Railroad Company vs. Texas*, 204 U. S., 403.

We come now to a discussion of two recent decisions which, as intimated earlier herein, are in spirit and in *dicta*, if not in result contrary to the doctrine of the Texarkana case as it has been generally understood.

Texas & Pacific Ry. Co. vs. Railroad Commission of Louisiana, 183 Fed. Rep., 1005 (C. C., E. D. La., December 22, 1910; aff'd 184 Fed. Rep., 989).

Southern Pacific Terminal Company vs. Interstate Commerce Commission, 219 U. S., 498 (Feb. 20, 1911).

In the first of the two cases which we have just cited it appeared that the Railway Company had filed with the Interstate Commerce Commission a Schedule of rates for the carriage of lumber from certain points in the interior of Louisiana to New Orleans for export shipment, and also that the Railroad Commission of Louisiana had fixed a different and lower schedule of rates on local shipments between the same points. Four days' free storage were allowed on local shipments and twenty days' free storage on shipments intended for export. Export shipments were also delivered at the ship's side free of charge by the railroad on notice from the shipper. Under these conditions certain cars of staves and poplar logs, intended for export, were shipped from interior points in Louisiana to New Orleans "on bills of lading of substantially the local form." On arrival at New Orleans, however, the consignees demanded and received the free storage accorded export shipments and at their request the cars were also later switched to the ship's side, without additional cost. For the entire service rendered the Railroad collected a higher rate fixed by the Interstate Commerce Commission on export shipments, as a result of which the Railroad Commission of

Louisiana assessed certain fines against the Railroad, the collection of which it sought to have enjoined. The question before the court, therefore, was whether or not the shipments in question constituted foreign commerce and were, therefore, within the jurisdiction of the Interstate Commerce Commission, or intrastate commerce and subject to the control of the State Railroad Commission. The Master to whom the case was referred concluded that the case was governed by the decision in the Texarkana case, and recommended that the Bill of the complainant be dismissed. The court, however, reached a contrary conclusion, and held that under the circumstances just stated the freight in question constituted an export shipment, moving in foreign commerce, which was, therefore, beyond the jurisdiction of the Louisiana Commission.

The principal distinction between the above case and the one now under consideration is that in the former the logs in question were intended for export to a foreign country, while in the latter the coal in question is intended for transportation by water to another state. There are, of course, many minor distinctions in fact between the two cases, but unless there is a distinction to be made between the intrastate carriage of commodities intended for export and those intended to be taken to another state—which point will be later discussed, the case above referred to would seem to be contrary in its result to the position of the appellant herein.

The court in his opinion in the Louisiana case agrees with the doctrine stated in the Texarkana case to the effect that both the railroad and shipper should be enabled to decide with certainty whether or not any given shipment is interstate or intrastate, but he takes the po-

sition that in the Louisiana case external circumstances indicated that the bill of lading did not constitute the entire contract between the shipper and the railroad company. In other words, this court does not professedly disagree from any conclusion in the Texarkana case, but distinguishes the two cases on their facts. There is, of course, a certain difference in fact, but it is submitted that the conclusion in the Louisiana case is directly opposed to the clearly expressed *dictum* in the Texarkana case which we have quoted earlier herein, and it is further submitted that the court in the Louisiana case proceeded in a manner contrary to the spirit of the ruling and opinion in the Texarkana case, when he went beyond the bill of lading to determine what he understood to be the entire contract between the shipper and the railroad, and especially when he concluded that any further movement of the lumber was a determinative factor in the contract for rail transportation which was only between two points in the state of Louisiana. In other words, it is suggested that the ruling in the Louisiana case opens the door to all the uncertainty which is avoided by the rule understood to have been laid down in the Texarkana case.

The second case above referred to, namely, *Southern Pacific Terminal Company vs. Interstate Commerce Commission*, 219 U. S., 498, involved the jurisdiction of the Interstate Commerce Commission to prohibit certain preferences given by the Southern Pacific Terminal Company to one Young, to whom the Terminal Company had leased one of its piers. The facts in that case disclosed that the Southern Pacific Terminal Company, which owned and operated certain piers for loading and unloading vessels, and The Galveston, Harrisburg &

San Antonio Railway Company, whose tracks alone reached the piers of the Terminal Company, were alike controlled by the Southern Pacific Company; that Young was a merchant and manufacturer engaged in buying for export cotton seed cake and meal in Texas and in other states north of Texas, shipping the cake and meal on bills of lading running only to Galveston, where the same would be delivered to him at a certain pier, which was leased to him by the Terminal Company under conditions which made it possible for him to handle his cake and meal at a cost of from 30c to 40c less per ton than his competitors who were required to handle their cake and meal over the other piers of the Terminal Company at a fixed rate of charge per ton. On this pier Young had facilities for grinding the cake into meal and sacking the same, and from this pier Young made his export shipments.

This court found that under all the circumstances of the case the Terminal Company was "a part of the railway" for the purpose of transporting the commodities in question from interior points to the Port of Galveston in order that the same might be exported and, therefore, ruled that the Interstate Commerce Commission had jurisdiction to forbid the preference complained of.

Near the close of the opinion, the following language is used by Mr. Justice McKenna:

> "It makes no difference, therefore, that the shipment of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export, and by their delivery to The Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a

carrier for transportation to their foreign destination, The Terminal Company being a part of the railway company for such purpose. The case, therefore, comes under *Coe vs. Errol*, 116 U. S., 517, where it is said that goods are interstate, and necessarily as well in foreign commerce when they have 'actually started in the course of transportation to another state or been delivered to a carrier for transportation.' In *Gulf, Colorado & Santa Fe Railroad Co. vs. Texas*, 204 U. S., 403, the facts are different and the case is not apposite."

If by the above language we are to understand that whenever freight is delivered to a rail carrier on a bill of lading running to a port of shipment, which freight after its arrival at the port of shipment is sooner or later to be exported, such freight is in foreign commerce from the beginning of its rail movement, then it would seem that the language just quoted states a view contrary to the position maintained by the appellant in the present case, unless there is a distinction to be taken between freight transported by rail for export and freight transported by rail for water carriage to another state. The conclusions contained in the language just quoted from the opinion in The Southern Pacific Terminal case are, of course, not necessary for the support of the decision arrived at in that case, for as is said in another part of that opinion in reference to certain contentions of the appellant, "this does not distinguish between the meal and the cake, nor between the *meal that is purchased at points outside of Texas and directly exported*, from that so purchased and manufactured on the wharves of The Terminal Company."

In other words, concluding as the court did that the terminal service was really an incident to or part of

the railway service and some of the cake and meal being transported from other states than Texas, it necessarily followed that the discriminations complained of were in part, at least with respect to commerce, clearly interstate, and, therefore, cognizable by the Interstate Commerce Commission.

We have, therefore, the decision of this court in the Texarkana case, to the effect that the intention of a consignor with respect to the future movement of goods in transit after their arrival at destination cannot change the nature of a subsequent shipment, and the statement in the opinion in that case that "the transportation is another thing and follows the contract of shipment, until that is changed by the agreement of owner and carrier," and we have the recent decision in The Southern Pacific Terminal case that the Interstate Commerce Commission has jurisdiction over certain terminal service incident to and inseparable from certain transportation, part of which originates in the same and part in a different state from that in which The Terminal Company operates, but all of which is intended for export, and we have the further statement in the opinion in this latter case that it makes no difference that some of the shipments were from points in Texas on bills of lading running only to Galveston. Owing to the conflict, as we see it, between these two statements as to what is regarded as the law, and in the absence of any decision by this court on facts similar to those in the present case, we submit to the Court the propriety and expediency as well as the logic of adopting the rule that, in every case, transportation, so far as its regulation is concerned, shall follow the contract for that particular transportation.

THE INTERSTATE COMMERCE COMMISSION HAS NO JURISDICTION OVER THE TRANSPORTATION UNDER CONSIDERATION.

The first section of the Act to Regulate Commerce provides that the Act shall apply to

> "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or *partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment*), from one state or territory of the United States or the District of Columbia, to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and *also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country*: Provided, however, that the provisions of this Act shall not apply to the transportation of passengers or property or to the receiving, delivering, storage or handling of property wholly within one state and *not shipped to or from a foreign country from or to any state or territory as aforesaid.* * * *." (Italics ours.)

With respect to this section, it will be observed in the first place that, by its plain and express provisions, it applies only to joint land and water transportation between the different states when a common control, management or arrangement between the connecting car

riers for a continuous carriage exists. Notwithstanding this limitation and notwithstanding the undisputed evidence that no common arrangement existed in this case between the railroad and any of the lake vessels (Rec., p. 95), and that the coal shippers themselves procured these vessels (Rec., pp. 85, 91), both of the courts below in the opinions rendered by them in the present case have stated and apparently relied upon their conclusions to the effect that the Interstate Commerce Commission had jurisdiction over the shipments of lake cargo coal from the Eastern Ohio coal field to the ports of Huron and Cleveland, Ohio, for trans-shipment by vessel to the states at the head of the Great Lakes.

The final paragraph of the opinion rendered by the court of original jurisdiction reads thus:

> "I, therefore, conclude that the Railroad Commission of Ohio has no authority to fix a rate on which lake cargo coal, as defined in the present practice of Railroad Companies, should be carried, *but that it is subject only to the authority of the Interstate Commerce Commission.*" (Italics ours.)

And early in the opinion the same court said:

> "It is insisted that with respect to this coal, there is no common control, management or arrangement for a continuous carriage or shipment between the rail carrier and the water carrier, as provided in the Interstate Commerce Act, and that without this there can be no interstate character given to the coal. As to this the answer is that when the Railroad agrees to haul and load for 90c as against a higher rate when not destined to another state, there is made in effect an arrangement between the rail carrier and the water carrier. It is not made with some particular water carrier, but it is made with whatever water carrier the operator arranges with to take the cargo."

Now we submit that the court was clearly in error in concluding that, under the existing circumstances, there was any common arrangement within the purview of the Interstate Commerce Act. In this connection we call attention to the fact that there was no common arrangement in the form of a through bill of lading, nor in the nature of any agreement for a division of the rate, nor in any other way. The railroad and vessel carriers acted distinctly independent of each other, not only with respect to their charges, but with respect to the movement of their transportation facilities. We also call the attention of the Court to the following case which, we submit, fully sustains our contention in this matter:

Mutual Transit Co. vs. United States, 178 Fed. Rep., 664 (C. C. A., 2nd Circ., 1910)

In this case action was instituted by the United States against The Mutual Transcit Company for alleged violation of the Elkins Act, and the principal question involved was whether or not The Mutual Transit Company, a corporation engaged in operating a line of steamships from Buffalo, New York, to West Superior, Wisconsin, was subject to the Elkins Act under the circumstances of the case. It appears from the facts that The Mutual Transit Company had agreed with The Camblen Iron Works that it would guarantee that the carriage of certain iron pipe by rail from a point in Pennsylvania to Buffalo, New York, and thence by water on the boats of the Transit Company would cost but 45c a hundred pounds. The iron pipe in question was shipped by rail over The Philadelphia & Reading Railway to Buffalo, and was in fact billed through to the point of destination on divisional rates filed with the Interstate Commerce Commission, but these divisional

rates and the filing of the same had not been agreed to by The Mutual Transit Company.

Under these circumstances the court held that The Mutual Transit Company was not subject to the provisions of the Interstate Commerce Act, for the reason that no common arrangement for a through transportation existed.

On page 666 of the Report will be found the following language:

> "The phrase '*common arrangement*' in view of its context evidently *means an agreement or understanding between connecting carriers* with respect to the transportation of merchandise, and the charges and divisions of the charges to be made therefor. *A mere agreement by an independent water carrier to accept freight from a connecting railroad and to transport it over its own particular road might be an 'arrangement' for continuous carriage, but would not be a 'common arrangement'* * * * . *The real arrangement under which this freight moved was made between the defendant (The Mutual Transit Company) and the shipper.* The defendant entered into no agreement with the other carriers. They were not parties to its agreement with the shipper." (Italics ours.)

In this connection reference may again be made to the case of *Ex Parte Koehler*, 30 Fed. Rep., 867, probably the very first case which interpreted the jurisdiction of the Interstate Commerce Commission and in which the court directed the Receiver of a Railroad which carried the goods from the interior of the State of Oregon to the Port of Portland for further carriage by vessel to San Francisco, that he need not report to the Interstate Commerce Commission, because such carriage by rail was not within the provisions of the Interstate Commerce Act.

A part of the opinion rendered in that case reads as follows (p. 869):

> "The mere fact that a railway wholly within a state and a vessel running between said state and another meet at a point within the railway state, and thus form a continuous line of transportation between the two states, by the one taking up the goods delivered by the other at its terminus, and carrying them thence to their destination, does not bring the carriers who so use the railway and steamer within the act. So long as the railway and steamer are each operated under a separate and distinct control, making its own rates, and only liable for the carriage and safe delivery of the goods at the end of its own route, the act does not apply to the transaction. To make these carriers subject to the act, the railway and vessel must, as therein provided, be operated or used under a 'common control' —a control to which each is alike subject, and by which rates are prescribed and bills of lading given for the carriage of goods over both routes as one."

This language is quoted with approval in a very recent decision handed down by the Commerce Court, in which it held that the Interstate Commerce Commission had no control over the business of water carriers which was not transacted under a joint arrangement with a rail carrier.

Goodrich Transit Company vs. Interstate Commerce Commission, 190 Fed. Rep., 943 (1911).

See also:

United States ex rel., etc. vs. Lehigh Valley Rd. Co., 115 Fed. Rep., 373.

United States ex rel., etc., vs. Chicago, etc., Rd. Co., 81 Fed. Rep., 783.

Interstate Commerce Commission vs. Bellaire, etc., Ry. Co., 77 Fed. Rep., 942.

From a late ruling of the Interstate Commerce Commission hereinbefore referred to *In the Matter of Transportation by The Chesapeake & Ohio Railway Company,* made June 12, 1911, and in which the Commission ruled that it had no jurisdiction with reference to rail shipments of lime made from a point in the state of Virginia to Norfolk, Virginia, for trans-shipment by vessel to North Carolina even when the freight was shipped in care of a vessel carrier which paid the rail charges in behalf of the consignee, it also appears that the Interstate Commerce Commission at the present time does not regard that it has jurisdiction over transportation such as that involved in the case at bar.

We should perhaps state in this connection that since the opinions were rendered in this case below by the Circuit Court for the Northern District of Ohio, Eastern Division, and the United States Circuit Court of Appeals for the Sixth Circuit, stating that the Interstate Commerce Commission had jurisdiction over the transportation in question, the same association of coal operators which instituted the proceedings before the Railroad Commission of Ohio, whose order gave rise to the present litigation, has also instituted a complaint with respect to the rates in force on the same traffic before the Interstate Commerce Commission, and has introduced testimony before that Commission, in order that no possible avenue for relief might be overlooked, but in view of the express wording of the Interstate Commerce Act and the ruling made by the various Federal Courts, we do not see how any order that the Interstate Commerce Commission might make would be sustained by the courts, for we submit that a considera-

tion of the facts in this case in the light of the language of the Statute and of the decisions of the courts and the Interstate Commerce Commission, must lead to the conclusion that no authorized relief can be obtained by the coal operators in Eastern Ohio from that Commission, for the reason that the commerce in question is not within the provisions of the Act.

In this connection, we desire to call the attention of this Court to certain of its decisions in which it has been stated that it was the object of Congress, in the Act to Regulate Commerce to cover with certain named exceptions the entire field of interstate and foreign commerce.

In *Texas & Pacific Railway Co. vs. Interstate Commerce Commission*, 162 U. S., 197, 212, after stating that it would be reasonable to suppose that the legislation embraced in the Interstate Commerce Act would comprehend the entire interstate and foreign commerce, except as express limitations might be found in the Act, the opinion continues thus:

> "It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a state), as well that between the states and territories as that going to or coming from foreign countries * * *.
>
> "Having thus included in its scope the entire commerce of the United States, foreign and interstate and subjected to its regulations all carriers engaged in the transportation of passengers or property * * * the section proceeds to declare that all charges, etc., * * *."

In *Armour Packing Co. vs. United States*, 209 U. S., 56 (1908), Mr. Justice Day, in discussion the question of whether or not the shipments under a through bill of

lading from an interior point in the United States to a foreign port were embraced in the provisions of the Elkins Act making it an offense to obtain transportation of property in interstate or foreign commerce at less than the carriers' published rate, in order to support the conclusion that the Elkins Act did embrace the rail haul, although made under a through bill of lading, referred back to the Act to Regulate Commerce passed in 1887, and spoke as follows with respect to it, as is shown by page 78 of the Report of that case:

> "The purpose of Congress to embrace the whole field of interstate commerce is made apparent by the exclusion only of wholly domestic commerce in the last clause of Section 1 of the original Act of 1887, and in the declaration of the scope and purpose of the Act declared in its title. *Texas & P. R. Co. vs. Interstate Commerce Commission*, 162 U. S., 197, 211. There is no attempt in the language of the Act to exempt such foreign commerce as is carried on a through bill of lading; on the contrary the Act in terms applies to the transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment."

If, as stated in the opinions of the two cases just quoted from, the Act to Regulate Commerce defines and describes all interstate commerce, and if, as we have tried to show, the Act does not cover the commerce in this lake cargo coal, it would seem to be a necessary conclusion that the transportation of that coal is not interstate, and that that transportation is consequently a proper subject of supervision for the Railroad Commission of Ohio.

Before leaving our consideration of the Interstate Commerce Act it seems proper to advert to the refer-

ences which have been made several times hereinbefore to the possibility of there being a distinction between transportation by rail from a point within a state to a port in that state when the freight transported was intended on the one hand for export to a foreign country, and on the other hand for carriage by vessel to another of the United States.

Abstractly reasoning, we cannot see why, if freight carried by rail from Louisiana points to New Orleans and marked "for export" is in foreign commerce from the time it leaves the original Louisiana points, a corresponding shipment of freight by rail from Ohio points to Huron, marked "lake," for subsequent water carriage is not in interstate commerce from the time it leaves those Ohio points. Consequently, it seems to us, as a matter of strict reasoning that a distinction between rail movements in anticipation of foreign commerce by water on the one hand and of interstate commerce by water on the other hand does not exist. And notwithstanding the fact that there is expressly included within the provisions of the Act, transportation of property from a point within a state to a port of trans-shipment in that state when the property in question is to be carried to a foreign country, but no provision for a similar transportation when the property in question is to be carried from the port of entry to another of the United States, we still think that these two transportations are regarded by the Act in the same light and are properly so regarded.

An examination of the section of the Act quoted herein a few pages earlier discloses that it first defines and describes commerce in this country subject to the Act, including therein joint hauls by rail and water un-

der a common arrangement. Then, under the "also" clause, it provides for transportation "*in like manner*" of property shipped to a port of trans-shipment, thence to go to a foreign country. We submit that this phrase "in like manner" refers back necessarily to the "common control, management or arrangement" clause used in establishing the scope of the Act as to joint land and water hauls between the states, and that the Commission therefore has jurisdiction over so-called export rail shipments originating in the same state as the port of shipment only when they are made under some sort of a common arrangement between the rail and ocean carrier. We submit further that the existence or non-existence of the necessary common arrangement is equally the proper test for determining whether the United States or a state has jurisdiction over the transportation by rail to port—whether it be an inland lake port or an open ocean port.

It has been held by this Court in the "Import Case" and the "Armour case," both referred to earlier herein, that the Interstate Commerce and Elkins Acts apply to the rail portion of foreign shipments where a common arrangement for through transportation exists, but we do not believe that it has been so held where no such arrangement exists, and submit that it should not be so held.

Owing to the fact that in the case we are now considering a joint rail and water haul exists, we do not deem it advisable to refer at any length to statements sometimes made that the Hepburn Amendment of 1906 to the Interstate Commerce Act, by substituting parentheses for commas at the beginning and ending of the phrase, "or partly by railroad and partly by water when

both are under a common control, management or arrangement for a continuous carriage or shipment," in the first section of the Act, extended the jurisdiction of the Interstate Commerce Commission over rail carriers to cases in which no common arrangement for through transportation existed. Let it suffice to say on this point, firstly, that we see no necessity for construing this rhetorical change as effecting any such result; secondly, that if the original Act covered the whole field of Interstate Commerce, no additional scope could be constitutionally given by Congress to the Commission; and, thirdly, that, even assuming such a change both constitutional and intended, and further assuming the coal now under consideration to be in interstate commerce, the transportation thereof would not be subject to regulation by the Interstate Commerce Commission for the reason that it is not "transportation * * * *wholly by railroad* (* * *) from one state * * * to any other state * * * of the United States * * *," as prescribed by the first section of the Act, exclusive of the parenthetical clause just referred to, but, on the contrary, is transportation partly by rail and partly by water, without either continuous carriage or common arrangement.

We, therefore, contend that in no possible aspect of the facts or the law, can it be concluded that the Interstate Commerce Commission has jurisdiction to establish the rate on the traffic affected by the order of the Railroad Commission of Ohio.

THE DECISION OF THE COURT BELOW.

We are here in this Court insisting that the Circuit Court of Appeals erred in its decision that the order of the Railroad Commission of Ohio unconstitutionally interfered with Interstate Commerce. That decision may be adjudged by this Court to be right or wrong, but if it be adjudged right, we submit that it cannot be so adjudged for the reasons given in the opinion handed down by the court.

In reaching the conclusion arrived at by the Circuit Court of Appeals the opinion discusses four matters.

In the first place the opinion states that the regulation of the rate in question is within the jurisdiction of the Interstate Commerce Commission, the language on this point reading thus (Rec., p. 114):

> "We think it unimportant to inquire whether the Interstate Commerce Commission has hitherto prescribed any rates for the particular service which is the subject of this suit. *It is enough that the matter is within its control*, and for aught we know that Commission may have not deemed it necessary to take action upon the subject, being satisfied with existing conditions." (Italics ours.)

Of course, if the preceding statement is correct the conclusion of the court is sound, for jurisdiction by the Interstate Commerce Commission necessarily pre-supposes the existence of interstate commerce. For reasons hereinbefore given, however, we contend that by the clear provisions of the Act to Regulate Commerce, the Interstate Commerce Commission has no control over the commerce now under consideration, because of the absence of any common arrangement for a continuous carriage. We have also earlier herein given both reason and authority going to prove that such common ar

rangement between the land and water carrier did not exist in our case and could not exist where the shipper and not the rail carrier arranged for the water haul. The only statement in the opinion of the Circuit Court of Appeals referring in any way to the existence of the common arrangement required by the Act is a single sentence where in discussing the conduct of the rail carrier in unloading the coal into the vessel, the court remarks that by so doing the rail carrier (Rec., p. 115)

> "participated in making the connection for a continuous transportation of the coal from the mines to its ultimate destination in the Upper Lake Ports."

We confess ourselves utterly unable to understand how the unloading of this coal by the Railroad into the hold of a vessel procured exclusively by the owner of the coal or his vendee, and absolutely subject to his control, can amount to a common arrangement between the railroad and vessel carrier for a through transportation.

There is no dispute as to the facts on this point. The testimony shows clearly that the rail carrier has nothing to do with the arrangement for the water haul. This is shown by the extracts from the testimony of Mr. Maurer and Mr. Osborne found on pages 85 and 91 of the Record and quoted earlier herein, and also by the admission of the appellee himself, where he states that there is "no direct arrangement," and that "if the fact that the shipper furnishes the boat and arranges the contract for the boat is not an indirect arrangement, why we have no arrangement" (Rec., p. 95).

We submit, therefore, that no "common control, management or arrangment for a continuous carriage or shipment" exists and that the Interstate Commerce

Commission has no jurisdiction to regulate the rate in question, even under the assumption that the coal in qusetion is in interstate commerce during its movement from the mines to the lake front.

The opinion of the Circuit Court of Appeals states in the second place that (Rec., p. 114),

> "while such an order as that made by the Railroad Commission might have been a valid exercise of its power before the time when the Federal government undertook the exercise of its own authority granted by the commerce clause of the Constitution, as it has done in recent years, yet in view of the legislation by Congress concerning the duties and liabilities of railroad companies engaged in Interstate Commerce, the power of the states has been greatly circumscribed."

In answer to this statement which, of course, assumes that the coal in question is an article of interstate commerce, we beg leave to suggest our belief that if the State of Ohio ever had power to regulate the rate in question it still had that power at the time the order complained of was made, and still has that power. We submit that by no Act of Congress has it ever taken over or attempted to take over the regulation of the commerce in question. Even under the assumption that this commerce is interstate, Congress has not only not assumed its regulation, but has by necessary implication declined to assume such regulation by creating the Interstate Commerce Commission, and limiting its jurisdiction over joint rail and water transportation to instances in which there exists a common arrangement for a through carriage. If there was ever a case for the application of the maxim "*expressio unius et exclusio alterius*," it seems to us it is found here.

But assuming that the commerce in question is interstate, and further assuming, contrary to the express provisions of the Interstate Commerce Act, that Congress by that Act authorized the Interstate Commerce Commission to regulate this traffic then, if the state, prior to the passage of the Act to Regulate Commerce had power, as suggested by the Court of Appeals, to make the order attacked, the state still retained and retains that power owing to the fact that the Interstate Commerce Commission has never acted in the premises, for this Court has expressly held that the mere delegation of power to the Interstate Commerce Commission is not such an Act of Congress as will effect a change from State to Federal control.

Missouri Pacific Railroad Co. vs. Larabee Flour Mills Company, 211 U. S., 612.

In this case it was said (p. 623):

"On the other hand it is said that Congress has already acted, has created the Interstate Commerce Commission and given it a large measure of control over interstate commerce * * *. A mere delegation by Congress to the Commission of a like power has no greater effect, and does not of itself disturb the authority of the state. It is not contended that the Commmission has taken any action in respect to the particular matters involved. It may never do so and no one can in advance anticipate what it will do when it acts. Until then the authority of the state in merely incidental matters remains undisturbed. *In other words the mere grant by Congress to the Commission of certain national powers in respect to Interstate commerce does not of itself and in the absence of action by the Commission interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens* * * *." (Italics ours.)

We submit that so far as the conclusion of the court below rested on the foundation that Congress had acted and taken over control formerly properly exercisable by the State, it is unsound. It seems to us that not only has the Interstate Commerce Commission not acted, but that we have also here a case in which "the silence of Congress" approaches eloquence in its apparently intentional omission of any grant of power over such transportation as is now under consideration.

In the third place this opinion justified in part its decision in the present case by stating a distinction between the present case and the case of *United States vs. Geddes*, 131 Fed. Rep., 452, decided some years ago by that same court, and which case has been stated and quoted from earlier herein in support of the argument for appellant. Now there are certainly distinctions in fact between the present case and the Geddes case, and it may be that those distinctions are such as to justify a different conclusion in those cases, but we think that when the court below stated in its opinion that the Geddes case (Rec., p. 114),

> "was rested upon the peculiar circumstances of that case and particularly upon the facts that the Railroad Company's contract for transportation had been completely performed when it deposited the goods at its own station and it had nothing to do and was in no wise concerned with their future disposition, whether they should be taken away by the consignee or some other Railway Company by his authority,"

its recollection of the facts in that case were not quite clear, for on page 453 of the Report of that case, it is stated that:

> "No through bills of lading for such freight were issued by either road, no through rate was

fixed by mutual arrangement, and no conventional division of a through freight charge was made. Each road charged and collected its local freight rate in this way: Freight transported to Bellaire by the defendant road and marked for a point in another state was delivered to the agents of The Baltimore & Ohio *with an expense or transfer bill which stated the original point of shipment, the consignee and place of consignment, and the freight charges of the delivering road. Way bills also accompanied the traffic. On taking charge of the freight The Baltimore & Ohio would assume the payment of the freight charges of the defendant road, collecting the entire charges on delivering the freight at its destination. The same method was pursued with respect to freight coming from outside Ohio * * *. There were weekly settlements between the two roads of these collections and the payment of any balance found to be due on such settlements; but each road became responsible for the freight charges of the other, whether they were ever collected from the consignee or not.* Such transfers of traffic were made nearly every day. Each Company's freight charges were in accordance with its own rates." (Italics ours.)

Under the agreement existing between the two connecting roads in the Geddes case, by which each terminal carrier in turn assumed the payment of the charges of the initial carrier and received regularly and daily freight bound to or coming from another state and so marked, all the shipper had to do was to hand his freight to the initial carrier and the two railroads thus working together conveyed the same to its destination where the consignee might receive the same and pay the entire freight charge.

In the present case none of the above agreements or understandings referred to exists between the rail and

water carriers and the freight is re-delivered by the rail carrier to the shipper or his vendee. Further in the present case no more public announcement with respect to the ultimate destination of the commodity transported exists than occurred in the Geddes case. Again, in the present case there is a breaking of the bulk of the units of rail shipment at the lake front, which by an application of the "Original Package" doctrine would result in terminating the commerce to which the coal had been subject in its trip to the lake front. This necessary breaking of bulk in order that new units of shipment for the water haul may be created seems, under the provisions of Section 7 of the Interstate Commerce Act to amount to a division of the entire transportation of the coal into two separate and distinct parts, for it is provided in that section that "no break of bulk * * * shall prevent the carriage * * * from being continuous * * *, *unless* such break * * * was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage * * *."

No breaking of bulk or interruption of any kind occurred in the Geddes case and comparing the circumstances of that case with the present one we are unable to understand why the coal in the present case should be considered in interstate commerce and the commodities in question in the Geddes case, considered by the same court to be intrastate commerce. It is the position of appellant herein that the decision in the Geddes case is correct and that the present case is indistinguishable from that case in principle and should have been decided in the same manner.

The fourth matter relied on in the opinion below

was the fact that the rail carrier made but one charge for the entire service rendered—which service included the unloading of the coal from the cars to the vessels. Of this service the opinion states (Rec., p. 115):

> "By the very terms of the service which The Wheeling & Lake Erie Railroad Company contracted to perform, it was required to deliver the coal into vessels provided to receive it and to load the vessels with the coal properly distributed in their holds and the cargo trimmed for its further transportation to the ports of other states. And this was included in the service for which the Commission fixed the rate of 70c per ton. It was a service which if the transportation had been ended by a delivery on its own docks or into its own warehouse would have been required to be performed by the subsequent carrier."

Now as a matter of fact and as a matter of practice the lake vessels do not load or unload their own bulk cargo. Independent concerns construct extensive plants for this purpose and perform this work. This matter, however, has been discussed at length earlier herein, where we attempted to show how impracticable and unsatisfactory and even absurd it would be to characterize the commerce in this coal by the varying manner in which this unloading service is performed from time to time and from place to place as the policy or caprice of the railroad dictates and requires.

We therefore, with all due deference respectfully submit that the decision rendered in the court below finds no proper justification in the reasons for that decision contained in the opinion handed down.

CONCLUSION.

In the foregoing we have attempted to give a fair and full statement of the facts connected with the situation now before the Court and to show, from an analysis and discussion of the cases bearing on the question, the reasons why it was not an unlawful or unconstitutional regulation of commerce which the Railroad Commission of Ohio attempted when it made the order establishing the rate for the transportation of lake cargo coal from the mines to the lower lake ports. We have tried to show that that transportation constituted an intrastate movement properly supervisable by the Ohio Commission and, incidentally, we have shown why, in our opinion, the Interstate Commerce Commission has no jurisdiction over that movement.

The major part of our argument has been in support of the proposition that the movement in question was intrastate, because the contract of carriage between the shipper and the carrier called only for carriage between two points both within the State of Ohio and the delivery of the coal at the point of destination to the shipper or his order. As a brief summary of much that we have said on this point we quote the following from *Cooke, Commerce Clause of the Constitution*, Section 26:

> "It seems clear enough that, transportation otherwise subject to regulation under the commerce clause, is not removed from its operation merely because of being carried on by different agencies, some acting entirely in one State. Thus a contract for continuous transportation, say from Philadelphia to a point in a distant western State, under a through bill of lading, is doubtless subject to such regulation, even as to transportation between Philadelphia and Pittsburgh, and on the supposition that that part of the transportation is performed by a

carrier whose agency in the transportation is confined to such part. *The application of the commerce clause in this respect is well illustrated by the Interstate Commerce Act, applicable by its terms to carriage 'under a common control, management, or arrangement, for a continuous carriage or shipment.'* It should be borne in mind that such provision does not necessarily exhaust the power of Congress in this respect, and transportation by an independent agency wholly within a State may be well within the scope of the commerce clause, though not within such provision. *It seems, however, the better view that even continuous transportation between points in different States is not, as to such transportation by an independent agency wholly within a State, included in the subject of regulation, in the absence of any arrangement for continuous transportation. If the existence of such arrangement as a necessary condition be dispensed with, the alternative seems to be that a mere purpose or intent of the shipper at the time of shipment (or it may be, afterward) that transportation shall be to a point outside of the State, is sufficient to bring it within the scope of the commerce clause.* There seems, however, to be serious practical, even if not legal, objection, to making the determination of the character of the transportation as subject, or not subject to regulation under the commerce clause, rest on so vague and uncertain a test as the purpose or intent of the shipper commonly a matter of much difficulty to satisfactorily prove." (Italics ours.)

To the preceding it may be answered that the coal is marked "lake" coal when it leaves the mines and that, of the coal so marked, the great bulk is undiverted *en route* and becomes cargo coal rather than commercial or vessel fuel coal, on its arrival at the lower lake ports, and hence is finally charged the rate which the carrier has chosen to impose on cargo as distinguished from other coal handled under conditions practically identical.

the result being that there is absolutely no doubt that it is the intention of the shipper later to take, or to sell to others who will take, a large but as yet unidentified portion of this coal to other states. To such an argument we reply, firstly, that it is our position that the fact that a shipper's intent is honestly and openly or even necessarily disclosed to all the world, including the carrier, does not make it just to penalize such a shipper. We have always understood that one of the main objections to permitting the intention of the shipper to characterize his shipment was that it was too uncertain a test, such intention being sometimes obvious, sometimes suspected and sometimes unknown. Secondly, we reply that this argument does not touch at all our position that the rail movement of this coal to the lake front, as we have described it, is but a preliminary and independent movement to a common assembling point, from which assembled mass, vessel cargoes may be extracted for shipment to other states. It must be borne constantly in mind that, in his dealings with the rail carrier, it is the dominant object and intent of the shipper and the sole necessary result of his contract with the rail carrier that his coal shall be taken to the lake front and there handed back to him or his appointee or vendee. This is the one immediate result of that contract, and not until after that has been accomplished does the coal operator or his vendee finally release any coal into the channels of interstate commerce. The *only prescribed destination* of this coal while in the possession of the carrier is a point within the State of Ohio, and we contend that it was never the intention of the individual states in adopting the Federal Constitution to preclude themselves from regulating contracts for the sale of transportation to be per

formed exclusively within their own confines. It is open to the shipper and connecting carriers to make arrangements for either local or through transportation. If they choose to contract for a local movement, we contend that the local law should govern; if for a through movement, that the national law should govern.

The nature of the movement of this coal is not and cannot be affected by any trade name which the carrier may choose to give to the coal thus carried. The fact that the carriers refer to this traffic as "lake" coal or that they may regard the rate in question as a "proportional" of a through rate cannot characterize this traffic. It is well known that railroads do sometimes make—whether properly or not we need not here discuss—what they call a "proportional" rate on traffic originating at a point prior to or going to a point subsequent to the points between which such "proportional" rate applies—even though all points considered lie within the same state, as, for instance, in the case of so-called railway fuel rates. This practice, under circumstances like those here considered, the Interstate Commerce Commission has condemned in a recent administrative ruling, "*Fourth Section Circular Number one*," issued March 13th, 1911, in which it defines a "proportional" rate thus:

> "A proportional rate is defined as one which applies to part of a through transportation which is entirely within the jurisdiction of the Act to regulate commerce; that is, the balance of the transportation to which the proportional rate applies must be under a rate filed with this Commission. A rate to a port for shipment beyond by water carriage not subject to the provisions of this Act would not be a proportional rate."

But however this may be, the thought is that it is the carriers' business to sell transportation, and if he chooses to sell and the shipper to buy, transportation for a commodity only between two points in the same state, the power and authority of that state are not ousted by the open or concealed intent of the shipper, by any nominal characterization on the part of the carrier of the rate imposed on the commodity transported, or by the joint connivance of both shiper and carrier.

The coal shippers in the No. 8 field purchase from the rail carriers transportation only from the mines to the lower lake ports, all in the State of Ohio; during the rail transportation to these ports, none of this coal has any definite or prescribed destination beyond that state: this coal is necessarily assembled at these points in large quantities; there a storage or demurrage charge is exacted by the railroad for more than seven days' delay in unloading it, and there it is transferred from the cars and transformed into new shipping units; the ownership of the greater part of the coal changes there and from there an independent vessel carrier, not subject to the Act to Regulate Commerce, and chartered by the shipper or his vendee, comes to the rail carriers' dock and receives the coal in the same manner as if the shipper or vendee brought his own vessel or train or wagon and received the coal; the Interstate Commerce Commission does not have jurisdiction to regulate the charge for this rail transportation. We contend, therefore, that the rail carriage of this coal is an intrastate movement, local to the State of Ohio, that the Railroad Commission of that state had and has jurisdiction thereover, and that the

order made by it was and is legal and binding on the appellee herein.

We, therefore, respectfully submit that the judgments of the courts below should be reversed.

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Attorneys for Appellant.

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No. 776.

In the

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October Term, 1911.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

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BRIEF FOR APPELLEE.

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October Term, 1911.

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RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
APPELLEE.

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BRIEF FOR APPELLEE.

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I.

Statement of the Case.

(a)

THE PLEADINGS AND PROCEEDINGS.

On May 10th, 1909, the Pittsburg Vein Operators' Association of Ohio filed a complaint with the Railroad Commission of Ohio against The Wheeling & Lake Erie Railroad Company attacking the reasonableness of the existing rate on lake cargo coal from the No. 8 district in Ohio to the hold of vessels at Lake Erie ports reached by said railroad. Subsequently the Railroad Commission of Ohio heard the complaint over the protest of the railroad company contending that the rate on lake cargo coal from the No. 8 district was applicable only to interstate commerce engaged in by the parties, and on the 28th day of February, 1910, entered an order against The Wheeling & Lake Erie Railroad Company and its Receiver fixing a rate of seventy (70) cents per ton F. O. B. vessel, Lake Erie ports, on lake cargo coal in lieu of the existing rate of ninety (90) cents per ton, F. O. B. vessel, Lake Erie

ports (R., 22, 23). A copy of this order was served upon the Receiver of The Wheeling & Lake Erie Railroad Company March 23rd, 1910, and by virtue of the statutes of the State of Ohio, provided such order of the Railroad Commission of Ohio is a law of the State of Ohio, would have become effective April 22, 1910, except for the proceedings taken by the Receiver in this cause asking relief upon the grounds set forth in the bill of complaint filed in the United States Circuit Court (R., 2).

On March 28th, 1910, the Receiver of The Wheeling & Lake Erie Railroad Company filed a bill of complaint against the Railroad Commission of Ohio and others attacking the legality of the order of the Railroad Commission of Ohio on the ground, among others, that the order regulating the rate on lake cargo coal from the No. 8 district, F. O. B. vessels at Huron and Cleveland, in carload lots, directly affected and interfered with the interstate commerce engaged in by the complainant below, over which the Railroad Commission of Ohio had no authority or power, inasmuch as the regulation of such commerce is vested in the federal government under the provisions of the Constitution of the United States. Pleas to the jurisdiction of the court were filed by some of the defendants, but subsequently withdrawn. The Railroad Commission of Ohio filed its answer to the bill of complaint on June 25, 1910 (R., 50), and the complainant filed his replication on the same day (R., 57).

The cause came on to be heard upon the bill of complaint, the answer and the replication and the testimony offered by the parties in support of their respective claims relating to the character of the commerce to which the lake cargo rate applies. The court found with the receiver of the railroad company that the lake cargo rate applied only to coal transported from a point within the State of Ohio to a point outside the State of Ohio, and held that the Railroad Commission of Ohio had no power

to prescribe the rate or rates to be charged thereon, and accordingly entered a decree declaring the order of the Commission void and of no effect and enjoined the Railroad Commission from enforcing the order (R., 118). The Circuit Court did not consider the other grounds attacking the validity of the order, deeming it unnecessary in view of its conclusion respecting the character of the commerce to which the rate applied (R., 118).

The Railroad Commission of Ohio perfected an appeal to the Circuit Court of Appeals for the Sixth Circuit from such judgment and decree of the Circuit Court. Subsequently the receiver filed in the Circuit Court of Appeals a motion to dismiss the appeal, claiming that appeal did not lie to the Circuit Court of Appeals but direct to the Supreme Court, because the jurisdiction of the Circuit Court was invoked on the ground that a law of the State of Ohio, to-wit, the order of the Railroad Commission of Ohio, violated the United States Constitution. The Circuit Court of Appeals overruled the motion, holding that the proceedings attacking the validity of the order were ancillary to the main proceeding in which the Circuit Court had taken possession of the property through the intervention of its receiver, jurisdiction in which case was based upon diversity of citizenship of the parties. *The Circuit Court of Appeals then proceeded to hear the case upon its merits, and having reached the same conclusion as to the probative effect of the testimony respecting the character of the commerce to which the rate in controversy applies, sustained the judgment and decree of the Circuit Court.* (*Railroad Commission of Ohio vs. Worthington, Receiver*, 187 Fed. Rep., 965, 966).

After the receiver, the appellee, had filed in the Circuit Court of Appeals a motion to dismiss the appeal, but before the same was heard, the Railroad Commission of Ohio, appellant herein, undertook to perfect an appeal

to this Court direct from the Circuit Court. This appeal is cause No. 505, October Term, 1911, entitled "Railroad Commission of Ohio, Appellant, vs. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Appellee." After the Circuit Court of Appeals had passed upon the motion to dismiss and had decided the case as stated above, the Railroad Commission of Ohio undertook to perfect an appeal from the Circuit Court of Appeals to this court. This appeal is cause No. 776, October Term, 1911, with the same title as in cause No. 505.

Subsequently the Railroad Commission of Ohio filed in this court in cause No. 776 a petition for writ of certiorari and a motion to consolidate said causes Nos. 505 and 776 and to advance the same for hearing. Thereupon, the appellee herein filed a motion for leave to file certain exhibits, advising the court of the fact that the Interstate Commerce Commission now has under investigation the readjustment of lake cargo rate from Pennsylvania, West Virginia and Ohio coal-producing districts, to the end that if the court in its judgment deemed it proper so to do it might consider such fact in determining the application for the writ of certiorari. The motion to advance and consolidate the causes and the motion for leave to file exhibits were granted.

(b)
STATEMENT OF FACTS.
(1)
FINDINGS OF THE LOWER COURTS.

The Circuit Court and the Circuit Court of Appeals reached similar conclusions as to the probative effect of the testimony offered by the parties relating to the character of the commerce to which the rate in controversy applies. The Circuit Court in its opinion uses the following language (R., 100):

"It seems to me that a consideration of the facts

can lead to no other conviction than that this lake-cargo coal has, when started on its journey, taken on the character of interstate commerce; the rate itself is fixed as an interstate rate; it is ninety cents only if and because there is to be a further transportation into another State at a rate which is fixed in consequence of a rate which the complainant charges.

"The complainant receives the ninety cents for (a) carrying the coal to the lake (b) loading it on a vessel which intends to, and must practically, carry the coal to some Northwestern port, and (c) trimming the coal in the hold so that it will carry safely.

"The loading and trimming are done for no other purpose than to contribute that much to the transportation to another State; in the sense of commerce as it is and must be carried on, it is mere sophistry to say that it might be unloaded at some other Ohio port; business could not be done as business, and is not done, in that way. But even if it were so done, it would immediately lose its character as lake-cargo coal and become subject to the rate on commercial coal, namely, $1.00."

The decree of the Circuit Court reads in part as follows (R., 102):

> "* * * and being fully advised in the premises finds with the complainant on the issues joined with reference to the character of such commerce and that the allegations of the bill of complaint respecting the character of the commerce to which the lake cargo rate is applicable are true, that the lake cargo rate involved in this controversy applies only to coal transported from a point in the State of Ohio, to-wit, the No. 8 District, to a point outside the State, * * *."

The Circuit Court of Appeals in its opinion, passing upon the merits of the case, use the following language (R., 113):

> "At the hearing in the Circuit Court, on the pleadings and proofs, Judge Tayler presiding, it was (as appears from his opinion sent up with the record) found, upon a recital of the facts as gath-

ered from the evidence that the rate of 70 cents per ton was intended to apply to lake cargo coal destined for transportation to the Upper Lake ports, that is, to ports in other states and to such transportation only. We are satisfied, upon an examination of the evidence upon that point, that the conclusion of the learned judge was correct * * * ."

(2)

THE EVIDENCE.

The evidence presented supporting the conclusions so reached by the Circuit Court and the Circuit Court of Appeals shows substantially as follows: Bituminous coal for tariff purposes is classified by the appellee as (a) railway fuel, (b) lake cargo, and (c) commercial coal. The first comprises coal sold to carriers at junction points and used by such carriers for fuel purposes. The second includes coal going from mines in the State of Ohio to points in the vicinity of the head of the Great Lakes and thence to points in the northwestern part of the United States via rail from mines to ports on Lake Erie in Ohio known as the lower lake ports, and thence by vessel to ports at the head of the Great Lakes (R., 60, 61, 62, 63, 64, 65, 68, 69). The third comprises coal used for commercial purposes, either at points on the appellee's line or points on the lines of connecting carriers (R., 70).

The No. 8 coal district of Ohio is situated in Jefferson, Harrison, and Belmont Counties, and the members of the Pittsburg Vein Operators' Association of Ohio are interested in mining coal in that district. The operators in that district in 1909 shipped over 400,000 tons of lake cargo coal over the railroad of the appellee to the lower lake port at Huron and trans-shipped the same by vessel to points in the Northwest (R., 18). This coal is shipped from the mines to Huron, where the railroad company has dock facilities and machinery and appliances for unloading coal into vessels during the season of navigation.

The coal when it leaves the mines is simply marked "Lake Coal" and consigned to the operator or to some office employe whose name is used as a mere matter of convenience for the purpose of designating a grade of coal (R., 62, 63, 65, 66). The operator notifies the railroad when a vessel will be at Huron to load so many tons of a particular grade of coal (R., 66, 80, 81). Whereupon, the railroad unloads such operator's coal into the hold of the vessel (R., 66) and trims or distributes the coal properly in the hold (R., 77), and makes out a cargo manifest and furnishes the shipper with a cargo statement showing the cargo weights, etc., from which the bill of lading is made out (R., 66, 76, 77). Trimming the coal in the hold of the vessel requires the railroad company to send its men into the hold of the vessel (R., 77, 78).

All coal shipped by the operators from the No. 8 district to the lake ports at the lake cargo rate remains on the cars until unloaded into a vessel (R., 77), unless it is diverted en route or at Huron before unloaded, in which case its is not treated as lake cargo coal and the lake cargo rate does not apply (R., 63). The lake cargo rate requires the shipper to furnish the vessel into which the coal is to be loaded by the rail carrier (R., 76). It does not apply to commercial coal consigned to Huron or to coal that has been diverted before or after reaching Huron (R., 63). The rate on lake cargo coal passing through the Huron gateway en route for the Northwest is less than the rate on commercial coal delivered at Huron. The reason for this is that the lake cargo rate is made on the basis of a through rate in order to enable the No. 8 lake coal to be marketed at Duluth and northwest delivery points (R., 76, 77).

The general plan with respect to handling lake cargo coal followed with only slight and immaterial deviations by all coal operators is best outlined in the testimony of Messrs. Roby

(R., 61, Osborne (R., 62, 63, 64), and Maurer (R., 65, 66, 67, 69, 70, 71, 72). The testimony of these witnesses shows that lake cargo coal forwarded through the Huron gateway is intended for a point or points beyond Huron and outside of the State, namely, to points in the Northwest at the head of the Great Lakes; that each operator estimates the amount of coal he expects to sell at the head of the lakes and usually before the opening of navigation arranges with various vessel companies for a supply of boats sufficient to transport the estimated tonnage; that the operator underestimating the amount of coal to be sold in the Norwest, must take the chance of making arrangements during shipping season for such additional tonnage; that sometimes the operator thinks better terms can be made with the boat owners if arrangements are not made until after navigation is opened, in which event vessels are chartered from time to time during the season of navigation; and that the operators engaged in lake cargo trade either own their own docks or control docks or have close relation with persons owning docks at the head of the lakes. The following testimony brings this out very clearly (substituting question and answer for the names of examiner and witness):

Testimony of Mr. Johnson (coal operator):
(Record 60.)

"Q. Taking the number eight coal and the Fairmont coal up the lakes to this dock in the northwest?

A. Yes, sir.

Q. Where is the dock of the Northwestern Fuel Company located?

A. Oh, they have docks at different places.

Q. Well, name the places?

A. Duluth, Green Bay--I hardly know where the docks are.

* * * * * *

(Record, 61.)

Q. The Central Coal Company, The Northwest-

ern Fuel Company, whose docks are on Lake Superior or somewhere up in the northwest, and in addition to that, you probably will sell a little additional coal to stray purchasers?

A. Anybody that wants to buy it, yes, sir.

Q. That constitutes your lake coal trade for this season or will constitute it?

A. Yes, sir."

Testimony of Mr. Roby (coal operator):

(Record, 61.)

"Q. Do you ship coal to the northwest?

A. Do you mean lake coal?

Q. Yes.

(Record, 62.)

A. Last year we shipped about 130,000 tons.

* * * * * *

Q. Does the C. Reiss Coal Company take all of your tonnage?

A. They took all the lake tonnage we sold last year.

* * * * * *

Q. Where are his docks?

A. Some at Green Bay.

Q. Any at Duluth?

A. Yes."

Testimony of Mr. Osborne (coal operator):

(Record, 63.)

"Q. What point do you deliver your lake coal when consigned to the railroad trade?

A. To Depot Harbor.

Q. You have no dock there?

A. No.

Q. Your dock is located at what point?

A. At West Superior, that is, Duluth Harbor, you know.

* * * * * *

(Record, 64.)

Q. Well, all of the coal that goes in there (lower lake port dock) that takes the lake rate goes to the northwest, doesn't it?

A. No, some of it goes to Detroit; some up along the river; some over into Canada—wherever we can get an order. Some of it we divert and we use locally.

Q. You pay the local rate if you divert it?

A. Yes, and take your demurrage charges, too."

Testimony of Mr. Maurer (coal operator):
(Record, 66.)

"Q. When you have gotten a boat to deliver a a cargo of coal, you make a bill for that cargo, do you?

A. Do you want the steps as we go along, the steps we take?

Q. Just state the steps that you take.

A. When we secure a boat for loading a cargo of coal, the first step is to call up Mr. Titus, the assistant superintendent of The Wheeling & Lake Erie road, and notify him that on a certain day a certain boat will be at Huron to load with Glens Run coal, and simply request him to have the coal there to load the boat. That is all we have to do with the railroad company. Ordinarily we cover with the vessel people our contract tonnage. In other words, if we are figuring on shipping 150,000 tons of lake coal we will probably distribute that tonnage among three or four shipping concerns. For example, the United States Transportation Company, the Gilchrist Transportation Company or some other transportation company covering that entire tonnage at a stated rate of freight to the different parts where we expect to ship. Then we notify these companies, whichever one we may select that on a certain date we desire to load a cargo. They report to us the name of the vessel, if they have one. Immediately upon the receipt of that report we fill out what we call a charter confirmation, giving the capacity and name of the vessel, where to load, and to what destination she is to go, the rate of freight and any other information that may be necessary, what kind of a vessel, where the vessel is to report for fuel, and whatever instructions may be necessary with reference to the vessel.

* * * * * *

(Record, 72.)

Q. * * * So that your company at the beginning of the season estimates the quantity of coal it wants to ship to the northwest ports or to your dock or to an independent dock?

A. Yes.

Q. And you proceed to start that amount of coal to the northwest; sometimes you do not sell it in advance; isn't that true?

A. Yes."

Testimony of Mr. Worthington (Receiver of complainant railroad):

(Record, 76.)

"Q. The rate f. o. b. vessel requires the shipper to furnish the vessel?

A. Yes, sir.

Q. And you are unable to load the coal into the vessel unless the vessel owner consents?

A. Exactly.

Q. Does it require the shipper to furnish a vessel any more than it does anybody else?

A. It requires the shipper, because the shipper arranges with us to place the coal aboard the vessel. We would not take an order from the consignee. The shipper instructs us what boat he wants that coal put into.

Q. Would you ship that coal to Huron f. o. b. vessel without knowing that the shipper intended to furnish you a boat in which to load it?

A. No. The reason the rate is made ninety cents is because we understand that we are furnishing what is known as lake coal, and that must be loaded on board vessel as soon as the shipper instructs us what boat he wants the coal loaded into.

Q. For transportation to the northwest?

A. For transportation to the northwest.

* * * * * *

(Record, 77.)

Q. I will repeat the question. Why is it your custom to have a lower rate on lake coal passing

through Huron gateway than it is on commercial coal delivered in Huron?

A. Simply because it is made on the basis of a through rate and to enable No. 8 lake coal to be marketed at Duluth and the northwest delivery points.

(Record, 81.)

Letter from M. A. Hanna & Co. (coal operators):

"Cleveland, O., June 18, 1909.

Mr. F. P. Barr, S. C. S.,

W. & L. E. R. R., City.

Dear Sir: We have sold a certain tonnage of No. 8 coal that is to go to Escanaba for the C. Reiss Coal Co. and they request that this coal be shipped to their own consignee and have selected the name, 'F. I. Kennedy.' They expect to float one cargo this month of between 7,800 and 9,000 tons, and we will commence shipment on this order about Tuesday or Wednesday next week. We give you this as a matter of information, so that when this coal is offered under the name of Kennedy, you will know for whom it is intended.

Yours very truly,

M. A. HANNA & CO.,

WPS-N. (By W. P. Schaufele).

Copy to—

Mr. A. P. Titus, Asst. Supt.,

Canton, Ohio."

Testimony of Mr. G. W. Ristine (traffic expert called by coal operators):

(Record, 59.)

"Q. Now, in considering this rate you have considered it, or you have considered the transportation of the coal from the Number Eight District through the Huron gateway as coal that is not destined for Huron, but for points beyond, have you not?

A. Sure.

Q. In other words, you have not treated this coal as local coal at Huron?

A. No. Local coal at Huron would be commercial coal."

Testimony of Mr. A. S. Dodge (traffic expert, called by coal operators):

(Record, 60.)

"Q. And, therefore, in your analysis and the conclusion which you have reached respecting this lake cargo rate you have treated the commerce as interstate commerce rather than state commerce?

* * * * * *

A. I could not lose sight of the fact that the ultimate destination of the coal was interstate."

II.

ARGUMENT.

(a)

THIS COURT DOES NOT HAVE JURISDICTION OF THIS CASE ON APPEAL.

In the brief filed on behalf of appellant in support of petition for allowance of a writ of certiorari counsel claim that appeal to the Circuit Court of Appeals was properly taken and admit the finality of that court's decision. Supplementing the position of counsel in that respect, we wish to call the court's attention to the fact that the Circuit Court of Appeals held with the appellant and against the appellee because it construed the bill of the receiver filed in the Circuit Court attacking the validity of the order as predicating jurisdiction upon the status of the property in the Federal Court and as ancillary to the original receivership suit. On this point the court say (R., 113):

"* * * It (the motion to dismiss filed by the appellee) is based upon the erroneous conception that the appellate jurisdiction of the case is the same as that applicable to cases of original bills. But this is the case of a bill which is ancillary to the original suit; and the jurisdiction of the Circuit Court to entertain it depended upon its jurisdiction in those suits. They were brought by the receiver

for the protection of the interests of the Railroad Company whose properties were in the hands of the court for administration. In such a case the court does not look either to the citizenship of the parties to the ancillary suit nor to any other peculiar matter affecting its jurisdiction. * * * It may be proper, though it is unnecessary, to say that even if this were an original bill, the claims made by it are not all of a character which require the appeal to be taken to the Supreme Court under the provisions of Section 5 of the Act creating the Court of Appeals. Some of the claims made are of that character, but one of them, the 3rd, at least, is not; and if it stood alone the appeal must have been taken in the Circuit Court of Appeals * * * ."

We do not wish to question the conclusion reached by the Circuit Court of Appeals or the interpretation placed upon the language of that portion of the bill invoking the jurisdiction of the Circuit Court. Nor do we understand that the appellant wishes to do so. Under such circumstances it would seem that this court is justified in adopting the conclusions reached by the Circuit Court of Appeals; and inasmuch as appellate jurisdiction in the Federal Court in cases of this kind is final, both appeals that have been taken to this court should be dismissed. It the court adopts this view, it remains to consider the petition for a writ of certiorari asked for by appellee.

(b)

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

For a detailed statement of the grounds relied upon in support of opposition to the granting of the writ of certiorari, we beg leave to refer the court to brief heretofore filed on behalf of respondent upon the petition for allowance of writ of certiorari. Briefly stated, the reasons why the writ should not be granted are:

(a) The record does not disclose any question of

law in regard to which there is not a uniformity of ruling.

(b) The record shows that the determination of the controversy depended upon the determination of an issue of fact, that is, the circumstances and conditions surrounding and the arrangement under which lake cargo coal is transported.

(c) It is the well-settled rule of this court that the concurrent decisions of two subordinate courts upon questions of fact will be followed unless shown to be erroneous.

(d) The Circuit Court and the Circuit Court of Appeals reached the same conclusion as to the probative effect of the testimony offered in the case, to-wit, that the rate applied to coal moving from a point in Ohio to a point outside the State and there is no showing that the conclusion so reached is erroneous.

(e) The case does not fall within the category of questions of such gravity and general importance as to require the review of conclusions of the Circuit Court of Appeals in reference to them. Nor will the granting of the writ prevent long and expensive litigation and "conduce greatly to the general commercial stability in the coal trade," inasmuch as a decision of the question presented in the record will not finally determine the controversy, as the order of the Railroad Commission was attacked upon other grounds that have not as yet been disposed of; and, furthermore, there is now pending before the Interstate Commerce Commission four cases involving the readjustment of the lake cargo rates from the states of West Virginia, Pennsylvania and Ohio to lower Lake Erie ports for trans-shipment via vessel to points at the head of the Great Lakes, and the presumption is that the Commission will in the near future adjust the rates and fix the differentials between the districts, and that such action is likely to produce that general commercial stability desired by the real party in interest in this

controversy, namely, the coal operators in the No. 8 Ohio coal district at a much earlier date than can be obtained at the end of long litigation in this case.

The petition for writ of certiorari should therefore be denied.

(c)

THE ORDER OF THE RAILROAD COMMISSION OF OHIO IS VOID.

Proceeding to a discussion of the case upon its merits, we submit that the decree of the Circuit Court and of the Circuit Court of Appeals should be sustained for the following reasons:

(1.)

THE FINDINGS OF THE CIRCUIT COURT AND CIRCUIT COURT OF APPEALS SHOULD BE FOLLOWED.

As stated above, the Circuit Court of Appeals reached the same conclusion as the Circuit Court respecting the probative effect of the testimony offered by the Receiver of the Railroad and found with the complainant on the issues joined with reference to the character of such commerce and that the rate in controversy applied only to coal transported from a point in the State of Ohio, to-wit, the No. 8 District to a point outside the State. It is a well-settled rule of this court that the concurrent decisions of two subordinate courts upon questions of fact will be followed unless shown to be erroneous.

The Carib Prince, 170 U. S., 655.

Court say, page 658:

"The settled doctrine of this court is that the concurrent decisions of two courts upon a question of fact will be followed unless shown to be clearly erroneous. *Compania La Flecha v. Brauer,* 168 U. S., 104, and cases there cited; *Stuart v. Hayden,* 169 U. S., 1; *Baker v. Cummings,* 169 U. S., 189, 198.

As, after a careful examination of the evidence, we conclude that it does not clearly appear that the lower courts erred in their conclusion of fact, we accept as indisputable the finding that the Carib Prince was unseaworthy at the time of the commencement of the voyage in question, by reason of the defect in the tank above referred to."

Adopting the foregoing rule and assuming the facts to be as found by the lower courts, and as stated above, no question is presented to this Court for consideration, because neither party challenges the statement that if the transportation involved in this controversy is transportation from a point in one state to a point outside the state the power of regulation pertaining to that transportation is vested in the Federal Government.

(2.)

LAKE CARGO COAL IS INTERSTATE COMMERCE.

The appellee contends that the transportation of lake cargo coal from the No. 8 district is interstate commerce, for the following reasons:

(1) The shipper engaging in the lake cargo trade intends to engage in interstate commerce.

(2) The shipper, pursuant to such intention, actually engages in such commerce and contracts with the vessel owner for the water carriage of such interstate transportation in order to provide boats into which the railroad company may load lake cargo coal. The Railroad Company cannot complete performance of its obligation until the shipper has provided the vessel.

(3) The railroad company knows the intention of the shipper and makes a rate of 90 cents f. o. b. vessels, which is ten cents less than the rate on commercial coal to the same point in consideration of the fact that Huron is not the destination of the coal.

(4) The lake cargo rate f. o. b. vessels is only applicable to coal shipped up the lakes beyond the state line;

and in this sense is a "proportional rate" constructed with reference to the total through carrying charges (via rail and vessel) from the mines to the head of the lakes.

(5) The interstate journey has commenced when the coal operator turns the coal over to the railroad at the mines, marked "Lake Coal."

(6) The coal when it leaves the mine is continuously in the possession of the carrier (rail and vessel) until it reaches its destination at the head of the Great Lakes.

(7) The journey from the mines to the head of the lakes is continuous (and intended by the railroad company, shipper and vessel owner to be so), broken only by the necessary transfer from cars to vessel. The vessel's duty attaches at the very moment the railroad company's has ended.

(8) After the coal leaves the mine there is no interruption of transit, except delay at Huron awaiting arrival of boat, but during all of such delay the coal is in the possession of the railroad company and the railroad company has not fully completed its contract. Immediately upon the completion of the railroad company's obligation respecting the lake cargo traffic, to-wit, *loading into vessel*, the vessel carrier proceeds on its way.

(9) The transportation of lake cargo coal from the No. 8 district to the head of the lakes is one entire transaction, participated in by the shipper, the railroad company and the vessel carrier under common arrangement whereby each party performs his respective duty, to-wit: the shipper furnishes the coal and arranges for the vessel transportation; the railroad company carries the coal from the No. 8 district to Huron by rail and unloads it into the vessel engaged by the shipper to transport the coal up the Great Lakes; the vessel performs the vessel carriage and consents to the performance by the railroad company of the unloading service into the hold of the vessel, which is essentially a duty that must be performed

in connection with the vessel carriage. Each party in performing its respective duty acts as a link in the interstate transportation intended by all to be carried on and each link is necessary and essential to the accomplishment of the common purpose of the parties, namely, the transportation of coal from the No. 8 district in Ohio to the head of the Great Lakes.

(10) The lake cargo coal rate includes two services, to-wit:

(1) Rail carriage from the No. 8 district to Huron; and (2) unloading service, namely, unloading coal from cars to the hold of the vessel engaged to transport the coal immediately to points beyond the State. The loading (into vessel) service is essentially a part of the transportation service to be rendered by the vessel unless the vessel owner and the shipper arrange to have it performed by others. The vessel service is clearly interstate, and therefore the loading (into vessel) service is interstate. The State Commission has no power to charge a portion of the 90-cent rate f. o. b. vessel to such loading service and then proceed to regulate the remaining portion on the theory that such remaining portion applies to a rail carriage which should be treated as intrastate in character.

(11) The railroad company knows (1) *that the coal is shipped from the lower lake port to the upper lake port by vessel;* (2) *that the shipper makes his own arrangement with the vessel carrier as to the terms and conditions (in other words, the rate) upon which the carrier will perform the rail portion of the journey, that is, will transport the coal from the lower lake port to the upper lake port;* (3) *that it is necessary for the shipper or some one in his behalf to make some arrangement with the vessel carrier in order that the shipper may perform his obligation with the railroad company, namely, to furnish a boat into which the railroad company may un-*

load the coal; and (4) *that the shipper's implied agreement to do so and to forward the coal to upper lake ports is a condition precedent to the shipper's right to the benefit of the lake cargo rate.*

In this connection attention is called to the four cases pending before the Interstate Commerce Commission involving the readjustment of the lake cargo rate from the states of West Virginia, Pennsylvania and Ohio to lower Lake Erie ports for trans-shipment via vessel to points at the head of the Great Lakes, contained in an exhibit heretofore filed in this cause. The complainant in one of the cases is the Pittsburg Vein Operators' Association of Ohio, the members of which own and operate mines in the No. 8 District of Ohio, being the same complainant that attacked the reasonableness of the rate involved in this controversy when the matter was pending before the Railroad Commission of Ohio. In the complaint filed by the Pittsburg Vein Operators' Association are found allegations substantiating the claim of the appellee herein respecting the character of the commerce. In this respect attention is called to the following allegations:

> "* * * said Receiver has been, and now is, engaged in the carriage and transportation of coal from the No. 8 field * * * in the State of Ohio, to certain ports on the southern shore of Lake Erie, * * * both located within the State of Ohio, which said coal at said ports * * * has been and now is transferred to lake vessels, and has been and now is carried on said lake vessels to points in other States * * *; that said coal so shipped from said mines to said lower lake ports for trans-shipment by water * * * is and for a long time has been transported by said defendants and each of them, under a contract of carriage, by the terms of which said defendants * * * agree to transport said coal in car load lots from said mines to said lower lake ports * * *, and there unload the same upon vessels to be supplied * * * by said shippers * * *, and * *

* it being further understood that said shippers will furnish lake vessels for the transportation of said coal by water to points in other States * * *."
(See Article 2 of the petition.)

And also the following:

"That said lake cargo coal so shipped by rail and water, as aforesaid, meets in the northwestern States * * * with said coal so shipped and transported from said West Virginia and said Kentucky coal fields, and competes in said northwestern coal markets with said West Virginia and Kentucky coal; * * *." (See Article 7 of said complaint.)

And also the following:

"* * * said defendant Receiver, * * * have been and now are giving to the West Virginia and Kentucky coal districts and to the coal operators and shippers therein, an undue and unreasonable preference and advantage; * * *." (See Article 9 of said complaint.)

3.

CASES SUPPORTING POSITION OF APPELLEE.

The foregoing reasons, insofar as they contain statements of facts, we submit, are abundantly supported either by the admissions of the parties as contained in the pleadings or by the testimony of the witnesses, and insofar as they contain legal conclusions, by the following authorities:

Southern Pacific Terminal Company vs. Interstate Commerce Commission and Young, 219 U. S., 498.

Syllabus:

* * * * * *

"Goods actually destined for export are necessarily in interstate, as well as in foreign, commerce, when they actually start in the course of transportation to another State or are delivered to a carrier for transportation, *Coe v. Errol*, 116 U. S., 577; this is the same whether the goods are shipped on through bills of lading or on an initial bill only

to the terminal within the same State where they are to be delivered to a carrier for the foreign destination."

This case involved the validity of an order of the Interstate Commerce Commission requiring the carriers to desist from giving undue preference to a certain shipper of cotton seed products at the port of Galveston, Texas, through failure to exact from him payment of wharfage charges for handling cotton seed cake and meal over the wharves, docks and piers of the carrier while at the same time exacting such charges from other shippers of cotton seed cake and meal. It appeared that the carrier had leased to the shipper a portion of the carrier's wharf facilities at Galveston; that the business of the shipper was that of buying and selling and converting cotton seed cake and meal for his own account, shipping it to himself by carloads to the wharf in controversy, there grinding it into meal, sacking it and loading it into steamships berthed at the pier. The carriers and shipper enjoying the lease resisted the order of the Commission upon several grounds, among others that the Commission by its order assumed to control intrastate commerce not subject to the Act to Regulate Commerce. The court sustained the validity of the Commission's order and in the opinion say, page 526:

"This evidence establishes, appellants contend, that the transit of the cake and meal is absolutely ended at the leased premises at Galveston, and that it is 'a final point of concentration and manufacture, the cotton seed cake being there manufactured into meal and sacked for export.' But this does not distinguish between the meal and the cake, nor between the meal that is purchased at points outside of Texas and directly exported, from that so purchased and manufactured on the wharves of the Terminal Company. Nor does it take account of the fact that the wharves were intended for shipping facilities, a means of transition from land carriage to water car-

riage. It is manifest, as we have said, that to make the wharves manufacturing or concentrating points for one shipper and not for all is to give that shipper a preference. And, being a preference, the traffic necessarily comes under the jurisdiction of the Interstate Commerce Commission. In other words, the manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in the transshipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things and make evasions of the act of Congress quite easy. *It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose.* The case, therefore, comes under *Coe v. Errol*, 116 U. S., 517, where it is said that goods are in interstate, and necessarily as well in foreign,commerce when they have 'actually started in the course of transportation to another State, or delivered to a carrier for transportation.' In *G., C. & S. F. Ry. Co. v. State of Texas*, 204 U. S., 403, the facts are different and the case is not apposite." (Italics are ours.)

Texas & Pac. Ry. Co. et al. vs. Railroad Commission of Louisiana, 183 Fed. Rep., 1005.

Syllabus:

"Complainant railroad companies filed with the Interstate Commerce Commission a schedule of rates from points in Louisiana to New Orleans for export shipments. The Railroad Commission of Louisiana had also fixed a schedule of different and lower rates on local shipments between the same points. It also

by an order allowed 4 days free storage on local shipments and 20 days on shipments intended for export, in which order the railroads acquiesced, and also delivered shipments for export at ship's side free of charge for switching. Certain shipments were delivered to complainants from points in Louisiana for carriage to New Orleans on bills of lading of substantially the local form, and on their arrival the consignees demanded and received the free storage accorded export shipments and free delivery to the vessel carrier; the shipments being delivered by complainants directly from their cars to such carrier, as was intended by the owner when it was shipped. *Held that, notwithstanding the use of the local bills of lading, the contract between the shippers and complainants was one for an export shipment, over which the Louisiana Railroad Commission had no jurisdiction,* and that complainants were entitled, and even required, to charge the rates on such shipments fixed by their schedules filed with the Interstate Commerce Commission." (Italics are ours.)

Court say, page 1008:

"* * * It is manifestly of great benefit to the exporter to be allowed to accumulate freight at a seaport, and to hold it for a reasonable time without additional cost. Ocean rates vary according to the supply and demand, and these privileges advantage the exporter in securing favorable rates for the water carriage. I can conceive of no reason why the railroad and shipper, instead of getting out a through bill of lading to the foreign port, should not agree to apply the export rate, with its incidental privileges, to all shipments which are, in reality, intended for export, and to allow the shipper to select the ocean carrier, provided, of course, no fraud or violation of law or public policy is contemplated. If they can do so by express agreement, they can certainly do so by tacit understanding or acquiescence.

"In the instant case both parties have treated the shipments as export shipments, and that is what they in fact were. It is not even hinted there

was any evasion of law or violation of public policy by their so doing. Therefore I do not think the form of the bill of lading should absolutely fix the status of the freight, as I consider the contract of carriage should be held to be what the parties really intended it to be."

Cutting vs. Florida Ry. & Navigation Co., 46 Fed., 641:

Syllabus:

"Orange growers in Florida shipped their fruit from one point in that state to another point in the same state, consigned to their agent at the latter point for re-shipment, who immediately forwarded them to their destination in another state. *Held*, that the shipment from the growers to the forwarding agent was interstate commerce, not subject to the control of the Florida Railway Commission."

The Daniel Ball, 10 Wall., 557, at 564:

"There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce 'among the several States,' with foreign nations, and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States. In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; *but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in com-*

merce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; *for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State and some acting through two or more States,does in no respect affect the character of the transaction. To the extent in which each agency acts in that transaction, it is subject to the regulation of Congress."* (Italics are ours.)

General Oil Co. vs. Crain, Inspector of Coal Oil, 209 U. S., 211.

Court say, page 228:

"The beginning and the ending of the transit which constitutes interstate commerce are easy to mark. The first is defined in *Coe v. Errol,* 116 U. S., 517, to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage. The latter is defined to be, in *Brown v. Houston,* 114 U. S., 622, the point of time at which it arrives at its destination. But intermediate between these points questions may arise. *State v. Engle,* 5 Vroom (N. J.), 435; *State v. Carrigan,* 10 Vroom (N. J.), 35; *The Daniel Ball,* 10 Wall., 557.

In *Pittsburg Coal Co. v. Bates,* 156. U. S., 577, coal in barges shipped from Pittsburg, Pennsylvania, to Baton Rouge, Louisiana, was stopped about nine miles above destination. It was held that it had ceased to be interstate commerce, and was subject to taxation by the State of Louisiana.

In *Diamond Match Co. v. Ontonagon,* 188 U. S., 82, logs in transit to a point without the state were held subject to taxation under a statute of the state where they would 'naturally leave the state in the ordinary course of transit.'

In *Kelley v. Rhoads,* 188 U. S., 1, a flock of sheep driven from a point in Utah, across Wyoming to a point in Nebraska for the purpose of shipment by rail from the latter point was held to be property engaged in interstate commerce and exempt from taxation by Wyoming under the statute taxing all live stock brought into the state 'for the purpose of being grazed.' There was no difficulty in the case except that which arose from the contention that the manner of transit was adopted as an evasion of the statute. Otherwise the grazing of the sheep was as incidental as feeding them would be if transported by rail. The pertinence of the case to the present controversy is in its summary of the principles of prior cases expressed in the following passage: 'The substance of these cases is that while property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another state, it becomes the subject of interstate commerce and is exempt from local assessment. Property, therefore, at an intermediate point between the *place of shipment and ultimate destination may cease to be a subject of interstate commerce. Necessarily, however, the length and purpose of the interruption of transit must be considered.*

In *State v. Engle, Receiver, etc.,* 5 Vroom (N. J.), 425, 435, *coal mined in Pennsylvania and sent by rail to Elizabethport, in New Jersey, where it was deposited on the wharf for separation and assortment for the purpose of being shipped by water to other markets for the purpose of sale, it was held that the property was not subject to taxation in New Jersey. The court said: 'Delay within the state, which is no longer than is necessary for the convenience of trans-shipment for its transportation to its destination, will not make it property within the state for the purpose of taxation.' See also in State v. Carrigan,* 10 Vroom (N. J.), 36, *where coal also shipped from Pennsylvania to a port in New Jersey and remaining there no longer than was necessary*

to obtain vessels to transport it to other places was held to be in course of transportation and not subject to the taxing power of the State. In *Burlington Lumber Co. v. Willets*, 118 Ill., 559, the principle was recognized that property *in transitu* was not subject to the taxing power of a State, but it was held that logs in rafts sent from Wisconsin to Burlington, Iowa, by the Mississippi River, a part of which were stopped at a place in Illinois called Boston Harbor, to be there kept until needed at Burlington for mill purposes, were subject to taxation. The court said that the property was 'kept at New Boston on account of the profit of the owners to keep it there; and further, that the company was engaged in business in the State beneficial to itself, and its property was so located as to claim the protection of the laws of the State and hence was liable to taxation.

Like comment is applicable to plaintiff in error and its oil. The company was doing business in the State, and its property was receiving the protection of the State. Its oil was not in movement through the State. It had reached the destination of its first shipment, *and it was held there, not in necessary delay or accommodation to the means of transportations, as in State v. Engle, supra, but for the business purposes and profit of the company.* It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the State beyond a mere halting in its transportation. It required storage there—the maintenance of the means of storage, of putting it in and taking it from storage." (Italics ours.)

Justice Moody, in the dissenting opinion, uses the following language, at page 235:

"The case of *American Steel & Wire Co. v. Speed*, 192 U. S., 500, holds that articles before they have ceased to be the subjects of interstate commerce may still be reached by the taxing power of the State. Accordingly it was held that the property of a citi-

zen of another State which had been brought into the State of Tennessee, placed in a warehouse for sale, and from there sold to persons within as well as without the State, was subject to a state tax. It was observed in the opinion in that case that the property had come to rest in the State and was enjoying the protection of its laws. But the case at bar, so far as it concerns the oil in tank No. 1, to which I confine my observations, is sharply distinguished from that case. * * * It was in Tennessee only momentarily ('a few days'), for the purpose of repacking and reshipping it, and for no other purpose whatever. The delay was to meet the exigencies of interstate commerce, which arose out of the nature of the transaction. It does not seem to me important, if such be the case, that it would begin the remainder of its interstate journey under a new contract of shipment."

* * * * * *

"I conclude that the oil in question was actually in the course of transportation between the States, was delayed in the State of Tennessee only for the purpose of conveniently continuing that transportation, and was, therefore, protected from state taxation by the commerce clause of the Constitution. *Coe v. Errol*, 116 U. S., 517, 525; *Kelley v. Rhoads*, 188 U. S., 1. Cases of taxation upon property before it has entered the channels of interstate transportation, or after the transportation has finally ended, seem to me to have no application. In the former class the property is taxable because it has not ceased to be a part of the mass of property of the State, and in the latter class because it has come to rest as a part of the mass of the property of the State. Between these two points of time it is exempt from the taxing power of the State. In every case where the tax has been sustained there were facts present regarded as essential by the court, which are absent here. The property had either not begun its interstate journey, as in *Coe v. Errol, ub. sup.*, and *Diamond Match Co. v. Ontonagon*, 188 U. S., 82, or it had ended that journey and was held for sale in

common with other property in the State, as in *Brown vs. Houston*, 114 U. S., 622; *Pittsburg Coal Co. v. Bates*, 156 U. S., 577, and *American Steel & Wire Co., v. Speed, ub. sup.*"

J. Rosenbaum Grain Co. vs. C., R. I. & T. Ry. Co., et al., 130 Fed., 46. (Circuit Court, Texas.)

Syllabus:

"A state railroad commission is without power to require a railroad company to cancel and abolish 'proportional tariffs' which apply only to interstate or foreign shipments, and which were adopted with the approval of the Interstate Commerce Commission, to prohibit the company from permitting export shipments of grain to be stopped in transit within the state for cleaning, grading, etc., or by similar orders to attempt to regulate interstate or foreign commerce."

Court say, page 47:

"The so-called 'proportional tariffs' on grain products, which the railroad company is required to cancel, are defined by the bill of complaint to be a collection of freight rates which apply upon interstate shipments from certain given points to certain other given points, when the commodities shipped originate beyond the place of shipping, or their ultimate destination is beyond the point to which the proportional rates apply. The 'proportional tariffs' in effect with the Chicago, Rock Island & Texas Railroad Company are effective with all other roads doing business in the State of Texas for like service. So far as this action is concerned, they are shown to be tariffs applying wholly to interstate business, and only to affect commerce between the states. They are subject to regulation by the Interstate Commerce Commission, and have been published and scheduled in accordance with the interstate commerce act, and approved of and acquiesced in by the Interstate Commerce Commission and all of the different roads on which they are effective. The complainant, the J. Rosenbaum Grain Company, a corporation organized under the laws of Illinois, and a citizen and res-

ident of that state, has invested a large sum of money in a grain elevator at Fort Worth, the southern terminus of the Chicago, Rock Island & Texas Railroad. It is largely engaged in the business of buying and selling grain for domestic uses and purposes and for export to foreign countries. It purchases grain in that region of the country north of Texas and yet tributary to the Gulf of Mexico. Having erected an elevator at the southern terminus of what is known as the 'Rock Island System,' it makes large purchases of grain in the country served by that system, and consigns it for shipment through Fort Worth when it is meant for export by way of the Gulf of Mexico. The right of stoppage in transitu is exercised at Fort Worth, and the grain is put through the elevator for the purposes of cleaning, clipping, grading assorting sacking, and otherwise preparing it for continued transportation. On shipments of grain where the complainant can take advantage of the 'proportional tariffs,' this is done. Complainant has large contracts on hand for the purchase and shipment of export grain. Owning the grain elevator at Fort Worth, it has made its arrangements to do business along the line of the Chicago, Rock Island & Texas Railroad and its northern connection, the Chicago, Rock Island & Pacific Railroad. With the 'proportional tariffs' canceled as required by the order, the complainant would not be able to comply with its contracts for the purchase and shipment of grain, by reason of the lower and 'proportional tariffs' being in effect on other railroads in favor of its competitors. The usefulness of its grain elevator at Ft. Worth for some of the most important purposes for which it was erected would be entirely destroyed. In passing this order, the Railroad Commission of Texas lays its hand upon interstate commerce, and seeks to control and regulate the same, notwithstanding the Interstate Commerce Commission is given and has exercised authority over these matters in accordance with the provisions of the interstate commerce act. Section 8 of Article 1 of the Constitution of the United States provides, among other things, that

the Congress shall have power to regulate commerce with foreign nations and among the several states. Ever since the decision of Chief Justice Marshall in the case of *Gibbons v. Ogden,* 9 Wheat., 1 6. L. Ed., 23, it has been the settled law that the power of Congress to legislate regarding and to regulate interstate commerce and commerce with foreign nations is exclusive, and all state legislation regulating such commerce is unconstitutional. Unquestionably this paragraph of the order of the Railroad Commission is illegal and void."

United States vs. Colorado & N. W. R. Co., 157 Fed., 321.

(Circuit Court of Appeals, Nov. 25, 1907.)

Court says, page 323:

"Importation into one state from another is the indispensable element, the test, of interstate commerce. Every part of every transportation of articles of commerce in a continuous passage from an inception in one state to a prescribed destination in another is a transaction of interstate commerce. Goods so carried never cease to be articles of interstate commerce from the time they are started upon their passage in one state until their delivery at their destination in the other is completed, and they there mingle with and become a part of the great mass of property within the latter state. Their transportation never ceases to be a transaction of interstate commerce from its inception in one state until the delivery of the goods at their prescribed destinations in the other, and every one who participates in it, who carries the goods through any part of their continuous passage, unavoidably engages in interstate commerce. *Rhodes v. Iowa,* 170 U. S., 412, 418, 419, 426, 18 Sup. Ct., 664, 42 L. Ed., 1088; *Kelley v. Rhoads,* 188 U. S., 1, 23 Sup. Ct., 259, 47 L. Ed., 359; *Houston Direct Nav. Co. v. Ins. Co. of North America,* 89 Tex., 1, 32 S. W., 889, 891, 30 L. R. A., 713, 59 Am. St. Rep., 17; *Leisy v. Hardin,* 135 U. S., 100, 10 Sup. Ct., 681, 34 L. Ed., 128; *Lyng v. Michigan,* 135 U. S., 161, 10 Sup. Ct., 725, 34 L. E., 150; *Caldwell v. North Carolina,* 187 U. S., 622, 631, 632, 23 Sup. Ct., 229, 47 L. Ed., 336.

There is nothing in conflict with this proposition in *Gulf, Colorado & S. F. Ry. Co. v. Texas*, 204 U. S., 403, 27 Sup. Ct., 360, 51 L. Ed., 540, because in that case the prescribed destination of the interstate shipment, whose origin was in South Dakota, was Texarkana, Tex. The assignee of the owner of the property who had shipped it to Texarkana rebilled the shipment from Texarkana, to Goldthwaite, in that state, and the Supreme Court held that the contract and carriage from Texarkana to Goldthwaite were intrastate and not interstate. In the case at bar the consignors shipped the goods to their prescribed destinations in Colorado when they started them from Kansas City and Omaha, respectively, and they never rebilled nor changed the destinatons. The goods went in continuous passages from the origins of their transportation in eastern states to their final destinations upon the line of the Northwestern Company in Colorado. The rebilling practiced by the railroad companies without any new consents or contracts with the owners could not destroy or affect the interstate character of the shipments or of the transportation. The Northwestern Company was a common carrier; it transported from Boulder, Colorado, to their prescribed destinations in that state, articles of interstate commerce consigned from cities in Missouri and Nebraska, respectively, upon continuous passages, to their designated destinations in Colorado. Each of these transportations from the respective points in Missouri and Nebraska to the places of consignment of the goods in Colorado was a single interstate carriage and transaction, and the Northwestern company, by reason of its transportation of these and like shipments through a part of their interstate carriage, necessarily became a 'common carrier engaged in interstate commerce by railroads,' and thus fell within the literal terms and the ordinary meaning of the provisions of the safety appliance acts, which declare that it shall be unlawful for 'any common carrier engaged in interstate commerce by railroads to haul cars used in moving interstate traffic unequipped with automatic coup-

lers.' Counsel for the company contend that this statute should be construed to except companies independently participating in such transportation. But construction and interpretation have no place or function where the terms of a statute are clear and certain, and its meaning is plain."

Ex Parte Koehler, Receiver, etc., 30 Fed., 867.

Court say, page 869:

"There is no doubt that this railway and these steamers are engaged in interstate commerce in the carriage of these goods under the circumstances stated. Any carriage of goods which crosses a state line is interstate commerce; and the fact that transportation from one state to another is accomplished in whole or in part through the agency of independent and unrelated carriers up to and from the state line, does not affect the character of the transaction in this respect. For, whenever an article destined to a place without the state is shipped or started therefor, it becomes the subject of interstate commerce, and the carriers employed in the transportation thereof, although neither of them may pass from one state to the other, are subject, as instruments of such commerce, to national legislation and control. *The Daniel Ball*, 10 Wall., 564; *Hall v. DeCuir*, 95 U. S., 485; *Wabash, etc., Ry. So. v. Illinois*, 118 U. S., 572, 7 Sup. Ct. Rep., 4; *Ex parte Koehler*, 25 Fed., Rep., 76."

Fargo vs. Michigan, 121 U. S., 230.

Court say, page 238:

"Freight carried from a point without the state to some point within the state of Michigan as the end of its voyage, and freight carried from some point within that state to other states, is as much commerce among the states as that which passes entirely through the state from its point of original shipment to its destination."

Houston Direct Navigation Co. vs. Ins. Co. of North America, 30 L. R. A., 713:

"*The questions to be determined are, did the*

cotton in question when delivered to the navigation company start on its journey to a point outside of the state of Texas? Was its destination at that time fixed and determined upon, and was the carriage from Houston to Galveston a part of the voyage, which was to be continuous? The facts in this case show that the owners of the cotton lived in Liverpool, and the cotton itself was by their agents put in transportation by delivery to the navigation company, to be carried by it to the city of Galveston, and there delivered to the Mallory Line, by which it was to be transported to New York, and thence by connecting line of steamers to the city of Liverpool. The bill of lading upon its face showed that the navigation company was to deliver the cotton to the Mallory line at Galveston, at which time the liability of the Mallory line should attach. There can be no doubt that the destinaton of the cotton, at the time of its delivery to the navigation company, was fixed and determined, and the point at which it was destined for final delivery was beyond the limits of this state. It is equally clear, from the bill of lading and other testimony, that a continuous voyage was contemplated, and the trip between Houston and Galveston was simply a part of that voyage. Upon the state of facts the cotton would undoubtedly come within the rule laid down in the cases cited above, and would be classed as interstate commerce. But the evidence likewise shows that the Houston Direct Navigation Company gave a bill of lading to Galveston only, and not a through bill of lading to cover the entire route, and the charges of freight to Galveston and wharfage at that place were paid at the time that the cotton was delivered. Do these facts change the rule of law applicable to the case, and constitute this a local shipment as distinguished from interstate or foreign commerce?" (Italics ours.)

After discussing various cases, the court concludes as follows:

"We conclude from the authorities and the facts in this case that the transportation of the cotton by

the Direct Navigation Company from Houston to Galveston was interstate or foreign commerce, and that its liability for the loss must be determined by the rules of law established by Congress, in so far as such rules have been prescribed, unless the provision of the charter before quoted operates to subject the corporation in the carriage of interstate commerce to the statutes of the state instead of the laws of Congress. * * * It follows from what we have said that in our opinion the liability of the Navigation Company in this case is to be determined under the laws of Congress upon the subject, or the common law, in so far as Congress has made no provision therefor, and not by the statutes of the state of Texas, which forbid the carrier to limit its liability as at common law."

State vs. Gulf, C. & S. F. Ry. Co., 44 S. W., 542 (Texas, 1898):

"A firm in Kansas City wanted to ship some sheep from San Angelo, Texas, to Kansas City. Instead of shipping them straight through they shipped them first to Fort Worth under the lower rates fixed by the State Railroad Commission and there unloaded them. Then they reloaded them on another road to complete the haul from Fort Worth to Kansas City. The court held that the shipment from San Angelo to Fort Worth was an interstate shipment and that the state therefore had no right to fix the rates for it."

State vs. Southern Kan. Ry. Co. of Texas, 49 S. W., 252:

"Where a carrier transports freight from a point in another state under a contract *for its delivery f. o. b. cars of a Texas railway*, to be shipped to another point in Texas, the latter carrier is engaged in interstate commerce and not subject to the State Railroad Commission regulations." (Italics ours.)

Gulf, C. & S. F. Ry. Co. vs. Fort Grain Co., 72 S. W., 419 (Texas 1903):

"If the final destination of goods shipped from a point without the state of Texas is a point within that state the shipment is an interstate one and not

subject to the commission rates of Texas, *though not made on a through bill of lading.*" (Italics ours.)

Porter vs. St. Louis Southeastern Ry. Co., 95 S. W., 453 (Ark. 1906):

"Shipper bought a carload of lime at Erin, Tennessee. He wished to transport it to Stuttgart, Arkansas. He shipped it to Brinkley, Arkansas, *and there reshipped it to Stuttgart, Arkansas.* Held, that it was an interstate shipment and that he must pay the interstate rate between Brinkley and Stuttgart." (Italics ours.)

Beale on Railroad Rate Regulation, Sec. 898:

"If the transporting of goods or passengers to an ultimate destination in another state has begun, interstate commerce has begun, and no device to break up the transit into intrastate portions will affect its real nature. So where transportation of goods destined for a point without the state has been actually begun, temporary stoppage within the state, without the intention of abandoning the original movement (which movement is ultimately completed), will not deprive the transportation of the character of interstate commerce. *Delaware & H. Co. vs. Com.* (Pa.), 2 Int. Com. Rep., 222 (1888). And so if the goods are first billed to a point in the state of shipment, and at that point are rebilled to their ultimate destination in another state, without breaking of bulk, the whole constitutes a single carriage."

Mattingly vs. Pennsylvania Co., 3 I. C. C. R., 592:

Commission says, page 608:

"Carriage does not cease to be continuous by incidental halts for inspection, customs purposes or transfers from one carrier to another. When a shipment is continuous the carriage is deemed continuous for the purpose of this Act. * * *."

Page 609:

"Only commerce not national in its character—that is purely internal commerce of a state—is that subject to rules prescribed by the national authority. * * * Every common carrier, whether by railroad

or conjointly by railroad and water, engaged in the transportation of interstate or foreign commerce for a continous carriage or shipment is declared to be subject to the Act. * * * What is meant by transportation wholly within one state? The answer seems plain. It is evidently the transportation that is an element of the commerce not subject to the jurisdiction of Congress. This commerce the court say is only that which is confined exclusively within the jurisdiction and territory of a state and does not affect other nations or states or the Indian tribes—that is to say, the purely internal commerce of a state; the commerce which is wholly confined within the limits of a state. Under this principle transportation wholly within one state, to which the Act does not apply, must originate and end in the same state. If the transportation be part of a voyage from one state to another, or of a shipment to or from a foreign country, it is interstate or foreign commerce and subject to the Act."

Beale and Wyman on Railroad Rate Regulation, Sec. 896:

"The purely internal commerce of a state is that which is confined within its limits, which originates and ends within the state. * * * The question whether a certain transaction constitutes interstate commerce must be determined, on the principles heretofore discussed, what the real transit is, and whether that traffic is or is not between separate states. Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced."

Massillon Coal Mining Co. vs. Railroad Commission of Ohio, et al. In the United States Circuit Court (unreported case), So. Dist., E. D.

The Railroad Commission of Ohio, in the matter pending before it in which the Haring-Wilson Company and the South Massillon Mining Company complained of the Wheeling & Lake Erie Railroad Company because of an alleged discrimination in the distribution of cars among coal operators on its railroad, made and promulgated the following order:

"That in making future allotments and distribution of coal cars by defendant to the shippers of coal having mines on its line of railroad there will be and hereby is established the regulation and practice of taking into account as available equipment all so-called private cars, foreign cars and system cars as a substitute for the regulation and practice of only taking into account for such allotments and distribution so-called system cars, and in the distribution of private cars, foreign cars and system cars each coal shipper located on the defendant's line of road shall receive his pro rata share thereof in proportion to his immediate requirements."

The Massillon Coal Mining Company and The Wheeling & Lake Erie Coal Mining Company, operators on complainant's railroad, thereupon filed a bill of complaint in the Circuit Court of the United States for the Southern District of Ohio, seeking to restrain the Railroad Commission and The Wheeling & Lake Erie Railroad Company from putting into effect the order aforesaid, claiming that the said order was void because it undertook to regulate the distribution of fifteen hundred cars in use on The Wheeling & Lake Erie Railroad Company's line of railroad and in which said cars the complainants claimed a leasehold interest and which said cars were used by the said complainants in the lake-cargo coal trade engaged in by the said complainants, and which said lake-cargo coal, as claimed by the complainants, constituted interstate commerce over which the Railroad Commission had no jurisdiction.

Upon motion of complainants for a temporary restraining order, the court issued an order restraining the Haring-Wilson Company and the South Massillon Coal Mining Company from commencing any action against the Wheeling & Lake Erie Railroad Company to enforce the rule above referred to. The Railroad Commission of Ohio, through the Attorney General of the State, stipulated in open court that it would not take any action to

enforce the said order, and such stipulation was made a part of said temporary restraining order issued at the time. Subsequently the Railroad Commission of Ohio instituted a proceeding before the Interstate Commerce Commission, asking that body to promulgate the same rule above referred to and to make the same applicable to cars engaged in interstate commerce. Later on the Railroad Commission of Ohio revoked the order and the United States Circuit Court dissolved the temporary restraining order and dismissed the action. In this case the jurisdiction of the Federal Court was founded squarely upon the proposition that the 1500 coal cars which the complainants claimed the right to have devoted exclusively to their uses were used in carrying on the interstate commerce of the complainants, towit: the carrying of lake-cargo trade, and which were needed by the complainants in carrying out large contracts in such trade. *The Federal Court, in granting the said injunction, necessarily had to hold that cars engaged in hauling lake-cargo coal actually at time of movement were engaged in interstate commerce, and the Railroad Commission, in failing to file a motion to dissolve the temporary injunction and in presenting the matter to the Interstate Commerce Commission, recognized the correctness of the position taken by the Federal Court in granting the preliminary injunction.*

(4)

CONGRESS HAS EXCLUSIVE JURISDICTION OVER INTERSTATE RATES.

The lake-cargo rate applies to a service that is either wholly interstate or in part interstate, and the regulation of it falls within the exclusive jurisdiction of congress, because rate-making is national in its character and admits of only one uniform system.

Wabash Ry. Co. vs. Illinois, 118 U. S., 557, at 577:

"Of the justice or propriety of the principle

which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the State legislature to determine that question. But when it is attempted to apply to transportation through an entire series of states a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution."

Kaeiser vs. Ill. Cent. R. R. Co., 18 Fed., 151, at 153:

"(1) The transportation of merchandise from place to place by railroad is commerce. (2) The transportation of merchandise from a place in one state to a place in another is 'commerce among the states.' (3) To fix or limit the charges for such transportation is to regulate commerce. (4) A statute fixing or limiting such charges for transportation from places in one state to places in other states is a regulation of commerce among the states. (5) The power to regulate such commerce is vested by the constitution in congress. (6) This power of congress is exclusive, at least in all cases where the subjects over which the power is exercised are in their nature national, or admit of one uniform system or plan of regulation. (7) *The state cannot*

adopt any regulation which does or may operate injuriously upon the commerce of other states." (Italics ours.)

Article by William Howland, 4 Harvard Law Review, 221, at 223:

"The commercial powers of Congress are not in terms exclusive; but it is now settled that they are exclusive where the subject-matter is national in character and admits of and requires a uniform rule. Accordingly, it is held, for example, that a state cannot regulate the rates of transportation on goods destined to another state, impose a tax on goods which are being transported into or through the state or prescribe the accommodations to be furnished passengers coming into or going out of the state."

Phila. S. & S. Co. vs. Pennsylvania, 122 U. S., 326, at 338:

"If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freight received for such transportation must equally belong to that power; and any burdens imposed by the state on such receipts must be in conflict with it. To apply the language of Chief Justice Marshall, fares and freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself."

See also the following cases:

Cooley vs. Board of Wardens, etc., 12 How., 299-319.

Covington, etc., Bridge Co. vs. Kentucky, 154 U. S., 204, at 219.

Fargo vs. Michigan, 121 U. S., 230, at 247.

Dow vs. Beidelman, 125 U. S., 680, at 689.

Article of William F. Dana, 9 Har. Law Review, 324, at 336.

Interstate Commerce Commission vs. Ry. Co., 167 U. S., 479.

Louisville & Nashville, etc., vs. Eubank, 184 U. S., 27.

U. S. vs. Colorado R. R. Co., 157 U. S., 321.
Beale and Wyman on R. R. Rate Regulation, Secs. 1336 to 1339.

Article of William F. Dana, 9 Harvard Law Review, 324:

After examining the cases on State Regulation of Interstate Rates of Fare and Freight, he says (page 336):

> "It may, therefore, be taken as well settled law today that the states have no power of regulation over the charges for transportation of interstate traffic whether of passengers or freight."

Covington, etc., Bridge Co. vs. Kentucky, 154 U. S., 204, at 219:

> "A State may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce ond beyond the constitutional power of the State."

The argument of counsel for appellant, found on pages 82 to 100, inclusive, of brief, apparently proceeds upon the assumption that the state has authority to regulate the transportation under consideration, if it appears that the Act to Regulate Commerce has failed to give the Interstate Commerce Commission authority over such rate. The fallacy of this argument is two-fold.

First, it overlooks the fact that the Federal Government has *exclusive jurisdiction* over rates applicable to interstate commerce. While the mere existence of a grant of power to the Federal Government may not be incompatible with the exercise of the same power by the states in the absence of Congressional legislation, yet certain grants have been made to Congress that are of such a nature as to require exclusive legislation by Congress. The rule for determining into which class the particular grant belongs is well laid down in *Cooley vs.*

Board of Wardens of Port of Philadelphia, 12 Howard, 299, at page 319, in the following language:

> "* * * Whatever subjects of this power (interstate commerce) are in their nature national, or admit only of one uniform system, a plan of regulation, may justly be said to be of such a nature as to require *exclusive legislation by congress.* * * *." (Italics ours.)

This rule has been adopted in the cases cited above, from which it would appear that the doctrine is well established that the Federal Government has exclusive jurisdiction over interstate rates, and that the failure of the Federal Government (if it is a fact that the Interstate Commerce Commission is without authority) to regulate an interstate rate of the character under consideration does not give the state the right to regulate such rate in the absence of federal regulation.

Second, it overlooks the fact that the Railroad Commission of Ohio did not claim authority to regulate the rate, because the Federal Government had failed to authorize the Interstate Commerce Commission to regulate the same and the state therefore had the power to do so, but because it found that the rate was in fact an intrastate rate. As stated by the United States Circuit Court of Appeals (187 Fed. Rep., at page 987):

> "The law of Ohio defining its (Railroad Commission of Ohio) authority confined its functions to intrastate transactions and gave it no authority to interfere with interstate commerce. * * * It follows its order is not one sanctioned by the laws of the state and derives no force or validity from its assumption of a power not delegated to it by the Legislature."

The Ohio Railroad Commimssion assumed to regulate the rate *because it erroneously reached the conclusion that the rate applied to intrastate commerce and not upon the theory that it applied to a portion of interstate com-*

merce respecting which the Federal Government had failed to provide regulation thereby.

(5)

CASES CITED BY APPELLANT ARE NOT APPLICABLE.

The principles announced in the foregoing cases are not inconsistent with and have not been modified or overruled in any case cited in appellant's brief. The cases when carefully analyzed *will not be found* to hold that the intention of the parties, the character of the traffic or destination of commodity are irrelevant in a case like the one at bar, nor will they be found to be decisive of the questions here. In all of the cases one or more of the elements are absent that are present in the case at bar —either one of the parties did not intend to engage in interstate commerce, or the carriage is not continuous, or the rate bore no relation to the ultimate destination, or the destination was not in fact known, or could not be known at the time the commodity was placed in the hands of the carrier. This is best illustrated by taking up and analyzing some of the cases cited in appellant's brief.

(1) *Heiserman vs. Burlington Railroad Company*, 63 Ia., 732.

This is an action by a shipper to recover freight charges in excess of a state statutory rate. The railroad company defended upon the ground that the traffic was interstate and that the interstate rate applied. The court, however, found that the *contract* provided only for an intrastate transportation and it showed on its face that the original *carrier was undertaking to exempt itself from any connection with the succeeding carriage.* The situation is entirely different in the case at bar, inasmuch as the facts show that the rail transportation and the unloading service are intended by the rail carrier to be and are necessary links in the transportation of the coal from the No. 8 district to its distributing market at the head of the Great Lakes.

(2) *Missouri, etc., Company vs. Cape Girardeau, etc., Co.*, 1 I. C. C. Rep., 30, 1887 (1 I. C. R., 607).

An examination of the opinion discloses that the facts in the above case are clearly distinguishable from the facts in the case at bar. The ties were delivered to a purchaser within the state and *the transportation of the ties into another state was by a new transit entirely independent of any known relation to the service performed by the defendant.* The Commission consequently declined to entertain the complaint. This case is lacking in several of the elements that appear in the case at bar.

(3) *New Jersey Fruit Exchange vs. Central Railroad of New Jersey*, 2 I. C. C. Rep., 142, 1888 (2 I. C. R., 84).

This was an action to require the defendants to reduce the rate on fruit from Flemington, New Jersey, to New York. The defendant denied that it made any rate from New Jersey points to the City of New York, but alleged that during fruit season it ran trains to Jersey City. The Commission found that "the undisputed facts are that the delivery is actually made in Jersey City; that the returns of the commission merchant invarably show the detention of a given sum for freight and four cents for cartage and that the consignees desire to receive and in fact actually do receive the peaches in Jersey City. Whatever *prima facie* contract may in some cases be inferred from the receipt of an addressed parcel, it is clear that in the present case no duty is undertaken and none devolves upon them beyond the delivery of the peaches at Jersey City. Upon this finding the Commission very properly concluded (page 86) that the transportation did not relate to interstate commerce. The facts are so different from the facts in the case at bar that further comment is unnecessary.

(4) *Fort Worth, etc., R. R. Co. vs. Whitehead*, 26 S. W. Rep., 172 (Texas Civil Appeal, 1894).

The syllabus in this case shows that the court's opinion was based upon the express finding that the railroad

company was engaged "only in carrying between the points in the state * * * without any *understanding* or arrangement that it should become a link in a chain of transportation outside the state." (Italics ours.)

The court say, page 173:

"It (railroad company) did not offer to show that it had authorized or ratified such through shipments nor that it was engaged in transportation under a common control, management or arrangement for a continuous carriage from the Indian Territory to Decatur or other points."

Page 174:

"While we have a statute which compels a carrier to receive goods from a connecting carrier there is no law, state or federal, which requires any carrier operating within this state to engage in the business of interstate carriage. If appellant (as we think should be inferred from its motion and brief) only engaged between Fort Worth and Decatur and other Texas points and only received the coal at Fort Worth in obedience to the statute just referred to, as it would have received goods originally shipped from Fort Worth or other points in Texas *without any sort of understanding or arrangement, express or implied*, that it should become a link in a chain of transportation from points beyond this state, we are of the opinion that the mere fact that the shipment of coal in question was undertaken by the Missouri, Kansas & Texas Railway Company in the Indian Territory to Fort Worth and thence to Decatur as its place of ultimate destination did not bring the act of appellant in carrying the coal forward to Decatur within the scope of interstate commerce regulation." (Italics ours.)

The facts in the case at bar show that the railroad company is a link in the interstate transportation and that all the parties intend it to be such; that it treats itself as a link in such interstate transportation, in the character of the service rendered and in the manner in which lake rates are made. We submit that this case is

not authority for the proposition that the intention and acts of the parties should not be considered in determining what the contract and arrangement really is.

(5) *Cincinnati, etc., Railroad Company vs. Interstate Commerce Commission,* 162 U. S., 184.

The defendant quotes from page 192 of the opinion. The facts in the suppositious case suggested by the Supreme Court are not analogous to the facts in the case at bar, because (a) the railroad company intends to participate in interstate commerce, (b) the destination of the coal when it leaves the mine on the lake-cargo rate is known to be a point outside the state, (c) and the journey is continuous by rail and vessel in accordance with the custom prevailing in the transportation of this commodity and with the arrangements made by the coal operator with the carriers in connection with its transportation. When the coal reaches Huron, its destination so far as the railroad company is concerned, is not at an end. The railroad company must put it on board a vessel, so that the transportation from lower lake port to upper lake port is not independent of any existing arrangement with the railroad company that had transported the coal to Huron. In this connection the Court's attention is called to the language of the court on page 193:

> "All we wish to be understood to hold is that when goods shipped under a through bill of lading from a point in one state to a point in another state are received in transit by a state common carrier under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. *When we speak of a through bill of lading we are referring to the usual method in use by connecting companies and must not be understood to imply that a common control, management or arrangement might not be otherwise manifested.*" (Italics ours.)

It will also be noticed in this case the court was discussing the jurisdiction of the Interstate Commerce Commission whose scope of authority is limited to certain interstate matters. If the railroad company were attempting to escape federal control insofar as the lake coal rate is concerned, we submit the court would have no difficulty in determining from the facts in the case that the railroad company has elected to become a part of a continuous line of transportation and that the parties engaging in the transportation of lake cargo coal from the No. 8 district to the head of the lakes, to-wit—the shipper, the railroad company and the vessel carriers—were doing so in pursuance of a common understanding or arrangement with reference to such traffic.

(6) *Minneapolis, etc., Railroad Co. vs. State of Minnesota*, 186 U. S., 257.

No question as to whether the commodity was moving in interstate commerce or not was presented in this case. Two questions arose, (1) the constitutionality of the Railroad Commission Act insofar as it assumed to establish joint through rates or tariffs over the line of independent connecting railroads, (2) and whether the tariff fixed by the Commission was compensatory. The railroad company in the first contended that it was beyond the constitutional power of the legislature to compel companies to enter into involuntary contracts with others at the instance of third parties, but the court held that in the case under discussion it was unnecessary for it to pass upon that question, as there was a joint tariff between the two roads which had been agreed upon and that such tariff was within the control of the legislature just as much as if it related only to transportation over a single line.

(7) *United States vs. Geddes*, 131 Fed. Rep., 452.

This is one of the early safety appliance cases. The opinion of the court discloses that the railroad company

(claiming to be exempt from the Federal Safety Appliance Act)

> "limited its interest, so far as it could, to the transportation of the freight over its own line. It made no arrangement with the Baltimore & Ohio for through carriage either way. *It was interested in none. It shared in none. It was interested only in its own local charge, and whatever arrangement it made was with a view simply of securing this.*" (Italics ours.)

In this respect the case differs from the case at bar, where the railroad company is interested in the arrangement the shippers make for vessels, because it cannot perform its obligation with reference to the loading of the coal into the hold of the vessel and is further interested in the destination of the coal, to-wit, at the head of the Great Lakes, for it makes its own charge for the rail haul of such through journey in the same way in which "proportionate rates" are made and which bear a relation to the total charges covering the entire journey.

(8) *White vs. St. Louis, etc., R. R. Co.*, 86 S. W., Rep., 962.

The facts as appear from the syllabus of the case clearly distinguish it from the case at bar.

Syllabus 1:

> "A passenger was carried by three separate railroads from a point outside the state to a point within the state. He had separate transportation issued by the respective companies. The last railroad company carried him from points within the state. The passenger's baggage was checked through from point of beginning to point of destination. By what authority the agent of the initial carrier so checked the baggage did not appear. *Held*, that the last railroad company was engaged in state commerce and Revised Statutes 1895, Article 320, expressly prohibited it from limiting its liability as a common carrier of the baggage."

The court say, page 964:

"It is obvious that the ticket and free passes held by Mrs. White were not in any way connected with or related to each other; that the right of transportation granted by each was limited to the respective lines of railroad operated by the company issuing the same; * * *; the checking of her trunk by its agent through to Dallas, Texas, did not create any obligation on the part of the St. Louis Southwestern Railroad Company to receive her * * *."

It also appears in the case that the last railroad company issuing the pass for the last stages of the journey had a right to cancel the pass at any time. There is lacking in this case all of the elements that are presented in the case at bar showing a common arrangement, purpose and intention with reference to the transportation of lake coal from the mines in Ohio to the head of the Great Lakes.

(9) *Gulf, C. & S. F. Ry. Co. vs. Texas*, 204 U. S., 403.

This was a case brought by the State of Texas against the Gulf, Colorado & Santa Fe Railway Company to recover $100 as a penalty for extortion, in a charge for the transportation of a carload of corn from Texarkana, Texas, to Goldthwait, Texas. The corn was carried between these cities "upon a bill of lading which upon its face showed only a local transportation." (See page 411.) The essence of the decision of the court is found on page 414:

"It must be further remembered that no bill of lading was issued from Texarkana to Goldthwait until after the arrival of the corn at Texarkana, the completion of the first contract for transportation, the acceptance and payment by the Hardin Company. In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it had made to know whether it was bound to obey the state or federal law, or, obeying the former, find itself mulcted in penalties for not

obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract. *It must be remembered that there is no presumption that a transportation when commenced is to be continued beyond the state limits, and the carrier ought to be able to depend upon the contract which it has made and must conform to the liability implied by the contract.*" (Italics ours.)

There was no evidence that the railroad knew any more about the shipment than was contained in the bill of lading, and it surely would have been unjust to inflict a penalty upon it because of the unrevealed intention of the successive owners of grain. It is elementary that there can be no contract unless there is a meeting of the minds. The Texas Railroad had no knowledge of the intention of the successive owners of the grain and consequently the contract as evidenced by the bill of lading cannot be interpreted as relating to an interstate shipment simply because one of the parties intend it to be such when it shows on its face that it relates to a shipment between two points in Texas. Such intention was therefore, under the facts, shown by the findings of fact, upon which the decision was based and to which it was limited, immaterial.

It is instructive to examine the decisions of the Texas courts in the same case, which decisions were affirmed by the United States Supreme Court. The decisions of the lower courts go somewhat more fully into the question involved than does the Supreme Court in its brief opinion, and recognize as important the considerations which we are urging as a feature upon which this case is to be distinguished from the case at bar, to-wit: the intent of the parties. Thus, in *Gulf, Colorado & Santa Fe Ry. Co. vs. Texas*, 32 Tex. Civil App., 1, the court clearly recognizes that the intent of the shipper is important. It distinguishes some apparently conflicting

cases upon this very ground. At page 9 the court says:

> "It is insisted, however, that the purpose or intent of the parties is irrelevant and immaterial. It may be and is doubtless so, when such purpose does not enter into the question of fact involved. But when necessary to determine the character of the shipment, or the status of the property as interstate commerce or otherwise, it may undoubtedly be considered. The purpose of the shipper, as an element of the fact to be found, was ascertained and given effect not only in the cases of *Waggoner vs. Whaley* and *State vs. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.), 44 S. W., 542, but also in *Cutting vs. Florida Ry. & Nav. Co.* (C. C.), 46 Fed. Rep., 641, as may be seen from an examination of those cases. See also Sec. 7, *Interstate Commerce Act*, page 3159 (3 U. S. Comp. St., 1901)."

Not only did the defendant railroad in the Texas case seem to be ignorant of the intention of the shippers of the grain to make an interstate shipment, but the Texas Supreme Court thought that the Harroun Commission Company, the original consignor, was also ignorant of the destination of the grain. See *Gulf, C. & S. F. Ry. Co. vs. Texas*, 97 Tex., 274, at page 284:

> "Here the Harroun Commission Company, the original consignor, were the owners of the corn when shipped, and until its arrival at Texarkana and delivery there to the Hardin Grain Company, in compliance with their contract for its sale, *they neither intended nor contemplated any shipment beyond the point to which it was consigned.*" (Italics ours.)

From the foregoing considerations, it must be apparent that the facts in the case at bar are vitally different from those in *Gulf, C. & S. F. Ry. Co. vs. Texas*, 204 U. S., 403, and the decision in that case cannot be regarded as a controlling authority when the facts as to the intention and knowledge of the parties are entirely different and the carriage is continuous in accordance with the arrangement made by the parties

and one of the parties—the railroad company—performs not only the rail service, but a service necessarily incident to the vessel carriage, to-wit, unloading into the hold of vessels.

This view of the case of *Gulf. C. & S. F. Ry. Co. vs. Texas*, 204 U. S., 403, is in harmony with the view of the Federal Court in the following cases: *United States vs. Philadelphia & R. Ry. Co.*, 188 Fed., 484, at page 486 (District Court, E. D. Pennsylvania, decided May 24, 1911), and *Texas & Pac. Ry. Co. et al. vs. Railroad Commission of Louisiana*, 183 Fed. Rep., 1005, at pages 1007 and 1008 (Circuit Court, E. D. Louisiana, decided December 22, 1910).

(10) *Laning Harris Coal Co. vs. Missouri Pacific Ry.*, 13 I. C. R., 154.

There is nothing in this case to show that the transportation of the coal from Springfield to Salina was intended by the parties to be a continuous shipment or that the railroad company based its rates on the assumption that they related to a through rate. The gist of the opinion is found on page 156:

> "From the facts it is clear that the complainant intended these as strictly local shipments and no evidence was offered by defendant to controvert this contention. It is true that complainant was unable to say positively whether or not these particular cars of coal had been sold by it prior to the time they reached Kansas City, but it is a fact that no orders were given to the defendant to carry the coal to any other points until after it had reached Kansas City. It is also true that this method of doing business is very customary. A dealer in coal, as in this case, locates at some central point of distribution and to that point he consigns in the first instance most of his coal. Some of it is actually consumed at such point as in the case at Kansas City, and some of it sold at other points, and it is generally difficult to determine definitely which particular car of coal is sold prior to its receipt at the cen-

> tral point of distribution. Under such circumstances and conditions when the coal is actually shipped into such central point of distribution and delivery is there made it must be regarded as a local shipment."

Lake coal moves from the No. 8 district to the head of the lakes, which is the central point of distribution for the Northwest. The carriage is continuous and the carriers are in possession of the coal throughout its entire journey until it reaches such central point of distribution.

(11) *Kansas City, etc., R. R. Co. vs. Brooks*, 105 S. W. Rep., 93.

Syllabus one and syllabus two show very clearly a different state of facts than exist in the case at bar. This case is not authority for the proposition that the intention of the parties is irrelevant. In fact, the contrary appears. Otherwise, the court could not have reached the conclusion that it did.

(12) *Augusta Brokerage Company vs. Georgia Railway Company*, 62 S. E. Rep., 996.

In this case the goods are redelivered to the consignor within the state. Assuming for the sake of argument that this Court is right in saying (page 997) that

> "the law is not dealing with the intention of the consignee, but solely with the relation of the railroad to the freight transported,"

it does not follow that the traffic is always intrastate where the service is all performed within the state. Where the railroad agrees that if the consignor ship his coal to a point outside the state he shall have a special rate; where the consignor accepts this special rate; where the coal actually reaches a destination outside the state in one continuous and uninterrupted transit during which the possession of the carrier is at no time surrendered to the consignor, does not the railroad treat this as an interstate shipment and must it not therefore be considered an interstate shipment even when judged

by the test laid down by this court? Subsequent language of the court (pages 997-8) makes this apparent:

> "If the railroad refuses to carry beyond its own lines and compels unloading at its terminus in Georgia, such business in its relation to the railroad is wholly intrastate."

In short, the railroad having refused to deal with this shipment as one made to a point without the state, the service is as to it purely intrastate, but had the railroad undertaken to carry the cotton seed on terms similar to those on which the coal was actually carried, in the case at bar, it would only be consistent with the language of the court to regard the carriage by the railroad, though performed wholly within the State of Georgia as interstate traffic.

(13) *Texas, etc., Railroad Company vs. The Sabine Tram Company,* 121 S. W., 256.

In this case, lumber was shipped from Ruliff, Texas, to Sabine, Texas, to the Sabine Tram Company, "Notify W. A. Powell Company." The court say, page 258:

> "No other contract or arrangement was made by the Sabine Tram Company for the carriage of the lumber, except that evidenced by the bills of lading aforesaid. Way bills accompanied the shipment, upon which were marked in pencil 'For export,' but the Sabine Tram Company had no connection with, or knowledge of the making of these way bills, which was the act of the Railway Company alone."

Page 259:

> "Upon arrival at the station at Sabine, it was by direction of the agent of the Powell Company carried without delay about a quarter of a mile beyond the station to the dock, where the lumber was to be unloaded. The lumber was unloaded from the cars into the water in the slip, in reach of the ship's tackle, ready for loading on to the ship. The Sabine Tram Company have no connection with this further carriage or switching of the lumber to the docks aft-

ter its arrival at the station at Sabine, but this was done solely at the instance and under direction of the agent of the Powell Company."

Page 261:

"The case is very much stronger here against the view that the movement to Sabine of a foreign shipment, in that the further movement of the lumber after reaching Sabine *was a matter with which the shipper, The Sabine Tram Company, had nothing whatever to do, and which was never at any time, in its mind, except as a surmise or general idea that the Powell Company intended the lumber for foreign shipment, after delivery to them, and after it became their property, upon payment for the sale and delivery of the bills of lading.*" (Italics ours.)

This case, then, is distinguishable from the one at bar, in that: (1) Here the owner takes possession of its goods and interrupts the transit, whereas in our case the owner assumes no control over the coal from the time it leaves the No. 8 district until it reaches some lake port outside the State; (2) Here the court expressly states and in determining that the carriage is intrastate relies on the fact (page 259) that the carrier has nothing to do with the unloading of the lumber from the car, and the reloading of its upon the ship. In our case, the reloading of the coal upon boats bound to points without the State is part of the service included in the carrier's charge; (3) Here there is no special rate for interstate shipments. The consignor deals with the carrier on a strictly intrastate basis. True (page 258) way bills accompanied the shipments, upon which were marked in pencil "For export," but the Sabine Tram Company had "*no connection or knowledge of the making of these way bills, which was the act of the railway company alone.*" (Italics ours.) In our case, the fact that the coal is destined for a point without the state is known both by the consignor *and the carrier, and this fact alone determines what compensation the carrier shall receive.*

(14) *Oregon R. & Navigation Co. vs. Campbell, et al.*, 180 Fed. Rep., 243 (Circuit Court of Oregon, 1910.)

This case is not decisive, for the reason that neither the transportation from Portland (the termination of the vessel transportation) to La Grande, both in the State of Oregon, nor the rail rate applicable thereto, had any relation to the vessel transportation from California to Portland, Oregon. In the case at car, the rate applicable to the rail portion of the transportation of lake cargo coal is conditioned upon the subsequent transshipment by vessel from lower lake port to upper lake port. The opinion of the court in the case cited is predicated upon the assumption that the contract of rail shipment is absolutely independent of the contract of vessel shipment. Court say, page 256:

> "The case turns upon the contract of shipment between the shipper and the carrier, and when that is at an end, the shipper can claim nothing further as it respects the property carried. It is then at the command of the owner, and if he chooses to ship it again from one point to another in the state, it becomes an intrastate shipment, notwithstanding the owner may be dealing with an article of interstate commerce."

(15) *Coe vs. Errol*, 116 U. S., 517.

This is a tax case in which the owner of logs attempted to evade taxation by the town or Errol, New Hampshire, on the ground that the logs were *in transit* to Maine and the subject of interstate commerce.

On page 524, the court say:

> "The question for us to consider, therefore, is, whether the products of a state (in this case timber cut in its forests) are liable to be taxed like other property within the state, though intended for exportation to another state, and *partially prepared for that purpose by being deposited* at a place of shipment, such products being owned by persons residing in another state." (Italics ours.)

Again on page 525, the court say:

"Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution."

"This case does not present the predicament of goods in course of transportation through a state, though detained for a time within the state by low water or other cause of delay as was the case of logs cut in Maine, the tax on which was abated * * *. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution. *And so we think would be the goods in question when actually started in the course of transportation to another state or delivered to a carrier for such transportation.*" (Italics ours.)

Again on page 527, the court say:

"It seem to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. *If such were the rule in many states there would be nothing but the lands and real estate to bear the taxes.*" (Italics ours.)

From the foregoing it appears (a) that the property was not in *course* of actual construction, (b) no common carrier engaged in interstate commerce was in possession of the same, (c) and actually transporting the same, (d) and nothing being done either by the owner of the property or any one for it in actually carrying out the owner's alleged intention to carry the logs to some other state, (e) or that the logs were ever carried out of the state. The court very properly decided that under such circumstances the alleged intention did not control and would not deprive the state of its right to tax the commodity, because any other view would put it in the power of an owner of personal property capable of transportation to swear the same free from taxation on tax day by simply alleging *an intent* to carry the same out of the

State. This is far from saying that intent may not be material under certain circumstances for the purpose of determining the character of a particular act or series of acts.

In the case at bar the coal is (a) actually moving from the mines en route to the Northwest (b) via the route served by two common carriers (railroad and vessel) (c) under contemporaneous arrangements made by the shipper, (d) both of which are necessarily related to each other in the interstate transportation because the owner would not contract with one carrier without the other (e) and from the moment the coal leaves the mine until it reaches final destination in the Northwest it is in the continuous custody and control of the carriers, each performing its particular function in such transportation.

(16) *Diamond Match Company vs. Village of Ontonagon*, 188 U. S., 82.

In this case logs were placed in a stream to be used at a mill within the state. In the autumn of 1896 this mill was destroyed. Every driving season thereafter some of the logs were sent to a mill in another State. The taxation of these logs in 1899 was resisted upon the ground that the logs were in course of transportation to points without the State.

Court say, page 97:

> "The number of logs shipped from Ontonagon to Green Bay before the levy of the tax complained of is given in the stipulation of facts and it is stipulated that 'about five hundred thousand feet of complainant's said logs in said river have been (in said river of Slough) constantly within said village since 1898 *for the purpose of shipment by rail* to the destination aforesaid.'" (Italics ours.)

> "The appellant's contention is that the movement of the logs commenced at the opening of the navigation of the river (presumably in the spring

or summer of 1896 and 1897), and from that date they were in continuous transit as subject of interstate commerce and exempt from taxation. The contention is more extreme than that made and rejected in *Coe vs. Errol.*" (Italics ours.)

The court found against the contention of the company by following the case of *Kelley vs. Rhoades,* 188 U. S., 1, holding that while property is at rest for an indefinite time or awaiting transportation, or awaiting sale at its place of destination or at an intermediate point it is subject to taxation, but said on page 96:

> "*But if it be actually in transit to another state, it becomes the subject of interstate commerce and is exempt from local assessment.*" (Italics ours.)

Lake coal moving from the No. 8 district is actually in transit until it reaches docks at the head of the lakes and at no time is it out of the possession of the carriers. In fact, the language of the court just above quoted is ample authority for the court below holding that the lake cargo rate is an interstate rate and not subject to regulation by the state commission.

(17) *People of New York vs. Knight,* 192 U. S., 21.

The vital distinction between this case and the case at bar is well stated by the court on page 27:

> "As we have seen, the cab service is rendered wholly within the state and has no contractual or *necessary relation to interstate transportation.* It is independently contracted for and not *necessarily connected therewith.*" (Italics ours.)

The court even finds that on the company's own showing the fact that the service is intended only for those starting or concluding an interstate journey is not brought home to the patrons of the cabs and thus there is one element lacking in proof of concerted arrangement with reference to an interstate transportation which is found in the case at bar, inasmuch as the shipper, the railroad company, the vessel carrier each in its turn per-

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forms its function with reference to the transportation of lake cargo coal from the No. 8 district to its central point of distribution at the head of the Great Lakes, and all joining in such common purpose.

(18) *Larabee Flour Mill Co. vs. Mo. Pac.*, 211 U. S., 612.

This was a case in which a state railroad commission made an order requiring the defendant railroad company to afford equal local switching service to its shippers. In passing upon the case, the Supreme Court said, on page 612:

> "This case does not rest upon any distinction between interstate commerce and that wholly within the state."

The Supreme Court affirmed the judgment of the lower court on the ground that furnishing cars is a matter respecting which a state may act until the Federal Government takes some action, notwithstanding the matter may relate to interstate commerce. Car distribution and regulation of rates are entirely different matters, and this case has not overruled the cases above cited that regulation of interstate rates is vested exclusively in the Federal Government.

There is nothing in the opinion of the court below in conflict with the position here taken. The court said:

> "The custody of the carrier is not impressed with the change which frees the goods from domestic control until after they have been finally released to it by the consignor for transportation to a destination fixed beyond the state line; and under the custom prevailing at Stafford this does not occur until the cars have been taken to the transfer track, received by the Santa Fe and finally billed."

In the case at bar the coal is released to the carrier when it leaves the mines and its destination fixed to a point beyond the state. Otherwise, the operator cannot forward the coal on the 90-cent rate, but must pay the full commercial rate of a dollar. Under the circum-

stances in this case the operator cannot change his mind and divert the coal and take advantage of the 90-cent rate. The railroad's contract duty is not fully performed until it places the coal in the boat, and by so doing the parties again ratify and confirm what was agreed upon respecting the coal when it was billed from the mines to Huron as lake coal, viz., that this coal is an interstate shipment and its destination fixed beyond the state line.

(19) *Chicago, etc., Ry. Co. vs. Becker, et al.*, 32 Fed., 849.

Court say, on page 854:

"This charge (switching charge) is not a part of the through rate fixed and determined beforehand, and has no reference to interstate shipment. The transportation of cars over the switches from the warehouses or mills to the depot, or from the depot to these mills, can be regulated in many respects by the commissioners, and the rate for performing the service fixed by virtue of the police power of the state, in the same manner as the carriage by dray per load or distance is established for the public good. And I see no difference in the principle to be applied in such cases, although, incidentally, they may be connected with interstate commerce. The service is local. * * *."

(20) *Chicago, I. & L. Ry. Co. vs. Railroad Commission of Indiana*, 87 N. E. Rep., 1030.

The conclusions of the court are based upon the finding that the service as rendered was strictly local and was not necessarily or incidentally connected with interstate commerce. This is emphasized by the following quotation from the opinion, page 1032:

"In so far as appears, the service rendered by appellant, was, in nature, the same as if it had drawn the cars to and from the gravel quarry by horses for a stipulated sum per car; * * *."

Further analysis of the opinion will disclose that there was no testimony to show that all the parties to the transaction were intending to engage in interstate commerce and were performing their respective functions in accordance with such intention.

In the case at bar the shipper has no such right when the coal reaches Huron. After the coal is unloaded into vessels, that vessel carrier is in possession and control of the coal, subject only to the shipper's right of *stoppage in transitu*. Furthermore, if the shipper diverts the coal, either locally at Huron or some other point on the line, the shipment loses its lake cargo character and the right to move on the lake cargo rate. None of these elements were presented in the case cited, and clearly distinguish it from the case at bar.

(21) *Wells-Higman Co. vs. Grand Rapids, etc., Ry. Co.*, 19 I. C. C. R., 487.

In this case the Commission say, at page 489:

> "By the terms of the bill of lading issued by defendant, Illinois Central, only a movement from Metropolis, Ill., to Chicago, Ill., was contracted for, and there was nothing to indicate that the shipment would ultimately find its way outside the state * * *."

The facts of this case are clearly distinguishable from those in the case at bar, where everything indicates that the shipments of coal are intended by all parties to find their way outside of the State of Ohio.

(22) *Wood-Hagenbarth Cattle Co. vs. Galveston, etc., Co.*, 130 S. W. Rep., 857.

In this case there was a re-delivery of the cattle to the shipper and the making of a new contract of shipment by him with another railroad. It was a case where the carriage was not continuous and the rate bore no relation to the ultimate destination. Furthermore, the court was strongly influenced by the fact that the carrier had no knowledge of the shipper's intention of sending the cattle outside of the state. In the case at bar the railroad

company knows the intention of the shipper and makes a special rate on lake coal, because it knows this coal is to go beyond the boundaries of Ohio.

(23) *Texas & Pacific Ry. Co. vs. Taylor*, 126 S. W. Rep., 1117.

The court in this case held the shipment to be intrastate, because "the contract of the initial carrier terminated at the point where the freight was restored to the control of the shipper and a new contract became necessary to the transportation of the freight to the final destination." This case is distinguishable from the case at bar, in that in our case the interstate journey is never broken by the restoring of the coal to the shipper. The coal when it leaves the mine is continuously in the possession of the carrier until it reaches its destination at the head of the Great Lakes.

(24) *United States vs. Chicago K. & S. R. R. Co.* 81 Fed., 783.

In this case it was held a domestice railroad company which transported freight solely on local bill of lading under a special contract limited to its own line and without dividing charges with any other carriers and assuming any other obligations to or for them, did not come within the provisions of the Interstate Commerce Act. In the case at bar, far from holding itself aloof from connecting carriers the transportation of lake cargo coal from the No. 8 district to the head of the Great Lakes is one entire transaction participated in by the shipper, the railroad company and the vessel carrier under a common arrangement, all of which has to do with the movement of lake coal upon its interstate journey.

(25) *Interstate Commerce Commission vs. Bellaire, Z. & C. Ry. Co.*, 77 Fed., 942.

The facts in this case are similar to those in *United States vs. Chicago, K. & S. R. R. Co.*, but bear no resemblance to those in the case at bar.

(26) *Mutual Transit Company vs. United States*, 173 Fed Rep., 664.

An examination of the facts of this case will disclose there was no such common arrangement as exists in the case at bar.

(27) *Dobbs vs. Louisville & N. R. R. Co.*, 18 I. C. C. R., 210.

In this case the rate made by the first carrier was not in any sense a proportional rate as in the case at bar, where the rate is constructed with reference to the total through carrying charges from the mines to the head of the lakes.

III.

CONCLUSION.

The argument of the appellant proceeds upon the theory that no arrangement or understanding of any kind exists between the vessel carrier and the rail carrier and that the rail carrier does not even know the kind of an arrangement the shipper or purchaser makes with the water carrier, unless they casually learn of the arrangement after it has been consummated. This position is not substantiated by the testimony except insofar as it may be intended to relate to the exact arrangement and the exact rate made with and secured from the vessel carrier from time to time for the transportation of coal from the lower lake port to the upper lake port. Counsel for the appellant have overlooked the fact that the rate in question is made in consideration of the purpose of the shipper to forward the coal up the lakes to another state after the railroad company has performed its portion of the carriage from the No. 8 district to the lower lake ports. This fact is important because in this sense the intention of the shippers and the acts pursuant thereto are important elements in determining the question at issue.

A distinction must be drawn between a mere expressed intention of the shipper to forward his property to another state after the conclusion of the carriage which is the subject of the immediate contract, and such intention or purpose when it becomes a part of and one of the terms of the contract between the carrier and the shipper. Applying this distinction to the case at bar, it will be found that the lake-cargo rate can only be obtained when the shipper designates his shipment "lake coal," consigns it to a lake port, and thereafter actually trans-ships it by boat beyond that port. The subsequent shipment by boat is a part of the contract of carriage between the railroad company and the shipper, and is the most essential part of it, insofar as the rates are concerned (because the lake-cargo rate is a "proportional rate" and is lower than the commercial rate to the same point, for the reason that the coal is destined for points beyond) and thus constitutes a joint arrangement between the shipper and the rail carrier that the carriage shall not end at the lower lake port, but shall continue by another carrier (which the shipper, by implied agreement, obligates himself to secure) beyond that point by boat. *The traffic is thus marked at the outset as an interstate shipment.*

The application of this distinction is shown in elementary cases in contracts where an illegal consideration is involved. A loan of money to pay a gambling debt or to gamble with cannot be recovered, when the lender is interested in the gambling transaction or the purpose for which the loan is made is an element of the contract. On the other hand, the loan may be recovered when the lender knows the object or purpose of the borrower, but is himself not interested, or where such object or purpose is not a part of or necessarily related to the contract of loan. See *Beach on Modern Law of Contracts*, Sec. 1484, and cases cited.

That the shipper may divert his coal after it reaches the lake port does not alter the situation. The moment he does another rate applies, and the original shipment (lake-cargo coal) drops out of consideration so far as the present controversy is concerned, and another and new rate (another and new contract) by consent of the parties is substituted. The rate controversy involved in this proceeding is necessarily limited to those shipments which have moved or will move by boat beyond the lower lake port and which carry out the original contract between the shipper and the railroad company respecting the rate applicable to coal known as "lake coal"; that is, coal for shipment from the No. 8 mines to the head of the Great Lakes. A diversion of lake-cargo coal to some other point, or to commercial coal, abrogates the lake-cargo contract and substitutes another.

If a shipment is made from San Francisco to New York and is actually started on its journey upon a rate based upon the carriage from San Francisco to New York, it is an interstate shipment, and the rate applicable thereto constitutes a contract between the parties relating to interstate commerce. If, however, the shipper stops the shipment *in transitu* at Los Angeles, and, by consent of the parties, the rate from San Francisco to Los Angeles is applied and the shipment actually used at Los Angeles, the same shipment may become state traffic, but this is because the contract originally made has been rescinded and a new one substituted, as well as because the shipment is physically stopped there. *In other words, it requires a modification of the contract of carriage in addition to the change in physical movement to deprive it of its interstate character.*

If the appellee were seeking to evade federal control upon the ground that the rail carriage and the loading service for which it makes a rate similar to a "proportional rate" in consideration of the fact that the coal is

destined for points beyond, should be treated as an independent transaction, bearing no relation to the remainder of the journey or to the trade engaged in by the shipper engaging in lake cargo trade, and was also claiming that the lake cargo rate on its face showed that the railroad company did not intend to participate with the shipper in engaging in interstate commerce, such claim and contention on the part of the appellee very properly should be treated as nothing more than a subterfuge for the purpose of avoiding federal control. In the present instance, however, the appellee is not seeking to evade federal control, but claims that the railroad company is engaging in interstate commerce when it engages in the transportation of lake cargo coal, and this contention is all the more real and apparent when consideration is given to the fact that the lake cargo coal from the No. 8 district meets in competition in the Northwest with lake cargo coal from the Pennsylvania and West Virginia districts.

We submit that the facts in this case and the law applicable thereto stamp the rate in question as a rate pertaining to interstate commerce, the exclusive control of which is vested in the Federal Government.

Respectfully submitted,

W. B. SANDERS,
W. M. DUNCAN,
Of Counsel.

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Supreme Court of the United States.

October Term, 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,

APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,

APPELLEE.

Notice of Motion for Leave to File Exhibits, Motion and Exhibits.

WM. B. SANDERS,
W. M. DUNCAN,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO.

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APPELLEE.

Notice of Motion for Leave to File Exhibits.

To Timothy S. Hogan,
Frank Davis, Jr.,
Charles C. Marshall,
T. H. Hogsett,
Counsel for Appellant.

Please take notice that the appellee will make a motion before the Court at the opening of its session on Monday, the 6th day of November, 1911, at or about the hour of noon, or as soon thereafter as counsel can be heard, for leave to file as exhibits to the cause certain copies of records of the Interstate Commerce Commission, as set forth in detail in said motion, copy of which motion is herewith served upon you.

WM. B. SANDERS,
W. M. DUNCAN,
Counsel for Respondent.

Service of the above notice is hereby accepted, and receipt of copy thereof and copy of motion and exhibits thereto attached, is hereby acknowledged this 30th day of October, A. D. 1911.

TIMOTHY S. HOGAN,
FRANK DAVIS, JR.,
CHARLES C. MARSHALL,
T. H. HOGSETT,
Counsel for Appellant.

EXHIBIT "A."

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of November, 1910.

INVESTIGATION AND SUSPENSION DOCKET NO. 26-A.

IN THE MATTER OF THE INVESTIGATION OF INCREASES IN COAL RATES BY THE NORFOLK & WESTERN RAILWAY COMPANY.

IT APPEARING from the records of the Interstate Commerce Commission that there has been filed with the Commission by the Norfolk & Western Railway Company certain schedules designated as supplement No. 21 to I. C. C. No. 2387-B, which schedule states new individual and joint rates and charges applicable upon coal that are in excess of the rates and charges now in effect,

IT IS ORDERED, That the Commission on its own initiative and upon complaint without formal pleading and without answer by the interested carriers do enter upon a hearing concerning the propriety of such advances and the lawfulness of the rates and charges stated in said schedule with a view to making such order in the premises as may after full hearing seem just and proper, and that such hearing be held at such time and place as may be hereafter fixed by the Commission.

THE COMMISSION being further of the opinion that pending such hearing and decision of the Commission as to the propriety of such rates and charges the

operation of such schedule should be postponed for the reason that from a consideration of the character and amount of the advances and the circumstances under which they have been made, it appears to the Commission that there is sufficient ground for claiming that said advances are unlawful and that the rates and charges established by said schedule are unjust and unreasonable and therefore unlawful, and that the public interest requires that the operation of said schedule be deferred until sufficient time has been given for an investigation by this Commission.

IT IS FURTHER ORDERED, That the operation of the aforesaid schedule be suspended and that the use of the rates and charges therein specified be deferred until the 15th day of March, A. D. 1911.

IT IS FURTHER ORDERED, That the several carriers named in said schedule as parties thereto, and hereinafter named, be and they are hereby made parties to this proceeding, and that a copy of this order be forthwith served upon each of them, viz.:

Ann Arbor Railroad Company.

The Ashland & Western Railway Company.

The Atchison, Topeka & Santa Fe Railway Company.

Au Sable & Northwestern Railway Company.

The Baltimore & Ohio Railroad Company.

The Baltimore & Ohio Southwestern Railroad Company.

Boyne City, Gaylord & Alpena Railroad Company.

Central Indiana Railway Company.

The Chesapeake & Ohio Railway Company of Indiana.

Chicago & Eastern Illinois Railroad Company.

Chicago & Erie Railroad Company.

Chicago & North Western Railway Company.

Chicago, Burlington & Quincy Railroad Company.

Chicago Great Western Railroad Company.

Chicago Junction Railway Company.

Chicago, Indiana & Southern Railroad Company.

Chicago, Indianapolis & Louisville Railway Company.

Chicago, Kalamazoo & Saginaw Railway Company.

Chicago, Milwaukee & Gary Railway Company.

Chicago, Milwaukee & St. Paul Railway Company.

The Chicago, Rock Island & Pacific Railway Company.

Chicago Terminal Transfer Railroad Company.

Myron J. Carpenter, Receiver of The Chicago Southern Railway Company.

The Cincinnati & Muskingum Valley Railroad Company.

Cincinnati, Georgetown & Portsmouth Railroad Company.

Cincinnati, Bluffton & Chicago Railroad Company.

The Cincinnati, Hamilton & Dayton Railway Company.

The Cincinnati, Lebanon & Northern Railway Company.

The Cincinnati Northern Railroad Company.

The Cleveland, Akron & Columbus Railway Company.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

The Dayton & Union Railroad Company.

The Dayton, Lebanon & Cincinnati Railroad and Terminal Company.

Detroit & Charlevoix Railroad Company.

Detroit & Mackinac Railway Company.

Detroit & Toledo Shore Line Railroad Company.

George K. Lowell, Benj. S. Warren and Thomas D. Rhodes, Receivers of Detroit, Toledo & Ironton Railway Company.

East Jordan & Southern Railroad Company.

Elgin, Joliet & Eastern Railway Company.

Erie Railroad Company.

Erie & Michigan Railway and Navigation Company.

Fort Wayne, Cincinnati & Louisville Railroad Company.

Grand Rapids & Indiana Railway Company.

Grand Trunk Western Railway Company.

The Hocking Valley Railway Company.

Illinois Central Railroad Company.

Indiana Harbor Belt Railroad Company.

Indianapolis Southern Railroad Company.

Interstate Car Transfer Company.

Iowa Central Railway Company.

Kalamazoo, Lake Shore & Chicago Railway Company.

The Lake Erie & Western Railroad Company.

The Lake Shore & Michigan Southern Railway Company.

Louisville & Nashville Railroad Company.

Louisville, Henderson & St. Louis Railroad Company.

Manistee & Grand Rapids Railroad Company.

Manistee & Northeastern Railroad Company.

Michigan Central Railroad Company.

The New York, Chicago & St. Louis Railroad Company.

The Northern Ohio Railway Company.

Ohio Electric Railway Company.

The Ohio River & Columbus Railway Company.

Supreme Court of the United States.

October Term, 1911.
No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
APPELLEE.

Motion for Leave to File Exhibits.

Now comes the respondent, and respectfully shows that the exhibits hereto attached will advise the Court of the fact that the Interstate Commerce Commission now has under investigation the readjustment of lake cargo coal rates from the Pennsylvania, West Virginia and Ohio coal districts engaging in such lake cargo coal business, respectively, and that among the parties to said proceedings and investigation are the respondent herein and the complainant before the Railroad Commission of Ohio, upon whose petition the Railroad Commission of Ohio originally made the order, the validity of which is the question sought to be raised by the writ of certiorari asked for herein.

Now, therefore, to the end that the Court, if in its judgment it is proper so to do, may consider this fact in determining the application for the writ, respondent moves the Court for leave to file as exhibits in this cause the following certified copies of records of the Interstate Commerce Commission, together with printed copies of

the same hereto attached, namely:

(a) Order of the Interstate Commerce Commission in Investigation and Suspension Docket No. 26 therein pending, entitled "In the Matter of the Investigation of Increases in Coal Rates by Carriers Serving West Virginia Fields"; and also "Statement of The Norfolk and Western Railway Company in Response to an Order of the Interstate Commerce Commission, Entered on the 23rd day of December, 1910," in the above matter.

(b) Complaint filed with the Interstate Commerce Commission in the case of John W. Boileau vs. The Pittsburgh & Lake Erie Railroad Company, et al., No. 3853;

(c) 1. Complaint filed with the Interstate Commerce Commission in the case of Pittsburg Vein Operators' Association of Ohio vs. Pennsylvania Company, No. 4116; and

2. Complaint filed with the Interstate Commerce Commission in the case of Pittsburg Vein Operators' Association of Ohio vs. The Wheeling & Lake Erie Railroad Company and B. A. Worthington, its Receiver, No. 4116, Sub. 1.

B. A. WORTHINGTON,
Receiver of The Wheeling & Lake Erie Railroad Company, Respondent.

WM. B. SANDERS,
W. M. DUNCAN,
Counsel for Respondent.

Pennsylvania Company.

The Pennsylvania Railroad Company.

Pere Marquette Railroad Company.

The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

The Pittsburgh & Lake Erie Railroad Company.

Pontiac, Oxford & Northern Railroad Company.

Rapid Railroad Company.

St. Joseph Valley Railway Company.

St. Louis Merchants Bridge Terminal Railway Company.

Terminal Railroad Association of St. Louis.

The Toledo & Ohio Central Railway Company.

Toledo, Peoria & Western Railway Company.

Toledo, St. Louis & Western Railroad Company.

Vandalia Railroad Company.

The Wabash Railroad Company.

The Wheeling & Lake Erie Railroad Company.

Wiggins Ferry Company.

A true copy.

(Seal) EDWARD A. MOSELEY,
Secretary.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

I. & S. Docket 26.

In the Matter of Investigation and Suspension of Advances in Rates for the Transportation of Coal by the Norfolk and Western Railway Company.

STATEMENT OF THE NORFOLK AND WESTERN RAILWAY COMPANY IN RESPONSE TO AN ORDER OF THE INTERSTATE COMMERCE COMMISSION ENTERED ON THE 23RD DAY OF DECEMBER, 1910.

The Norfolk and Western Railway Company, in response to an order of the Interstate Commerce Commission requiring it to "submit to the Commission on or before January 20th, 1911, a brief or statement in regular printed form, setting forth any justification they may have for the advanced rates on carload shipments of coal fixed in the above named tariffs (Supplement No. 21 to I. C. C. No. 2387-B) from and to the points named in said tariffs," now comes and respectfully represents to the Commission:

First. That, for a number of years, this Company has recognized that the rates which have existed on the traffic known in this record as "Lake Coal" have been lower than what they should normally and properly be, and that they do not fairly represent the cost of the service or the value of the services incident to the traffic. While their application yields some profit the profit is very small and the return is not adequate.

The joint rates made by this Company on lake coal from the various mining districts located on its railroad

to Sandusky, Ohio, which is the port mainly used by this Company, to which its lake coal is transported, and the respective distances to said port and the rate per ton and the rate per ton one mile, as the same now exists, as well as the proposed rate per ton and rate per ton one mile, are as follows:

DISTRICT	DISTANCE	RATE	Rate per ton per mile.	Proposed rate per ton mile.	Proposed rate.
Pocahontas	441	$1.12	2.54 Mills	2.75 Mills	$1.21¼
Tug River	409	1.12	2.73 "	2.96 "	1.21¼
Thacker	368	.97	2.63 "	2.88 "	1.06¼
Kenova	326	.97	2.97 "	3.26 "	1.06¼
Average for all	386	$1.045	2.71 Mills	2.95 Mills	$1.13¼

Second. This Company avers that the above existing lake rates are substantially lower than any coal rates made by this Company to any point whatsoever for the same distance; that they are believed to be lower than any coal rates made in this country by any railway company where the conditions of traffic and transportation are similar to the conditions under which this traffic is carried; and it further avers that tested by any of the commonly accepted standards and measures or by any standards and measures possible to be suggested the said rates cannot be regarded otherwise than unusually low. The existing lake rates to Sandusky and Toledo as well as those which are proposed are much lower than the coal rates proper to said destinations from the same points of origin.

Third. That, for the purpose of performing its duties as a common carrier according to the standards now demanded by the public and to maintain its own efficiency and financial integrity, additional revenue is essen-

tial in order that funds may be available to the Company with which to meet its increasing current expenses and with which to provide a sufficient surplus fund in order to meet the cost of such replacement and those improvements which are proper to be paid out of and charged to the current revenue of the Company and to maintain and protect the credit of the Company.

Fourth. This Company, further responding to the order of said Commission, avers that, whether the reasonableness of its existing rates upon lake coal be considered in and of themselves, or in relation to other rates maintained on similar traffic by this Company, or in comparison with similar rates made by other companies transporting similar traffic under substantially similar conditions, it will appear that the existing rates on lake coal are exceptionally low and that the proposed rates will be in every respect reasonable and lawful; and that this Company should not be compelled to continue to carry this traffic at the present rates under existing conditions; and that under all the facts and circumstances of the case a just regard for the interest of the Company and the public who are dependent upon it for transportation service justify the proposed rates.

When the said order was served on respondent there was nothing in the record to show and no information was given the respondent of the ground upon which complaint had been made of the proposed rates. Since the date of said order, however, there has been recently filed in this proceeding the petition of the Louisville Coal and Coke Company and the Red Jacket Consolidated Coal and Coke Company, containing a statement of their objections to the said rates, and respondent asks that reference may be had to its answer to be made to said peti-

tion for further facts and circumstances which will be pertinent to a response to that petition.

Respectfully submitted,

NORFOLK AND WESTERN RAILWAY COMPANY,

By L. E. JOHNSON,
President.

R. WALTON MOORE,
LUCIAN H. COCKE,
JOS. I. DORAN,
Counsel.

January, 1911.

INTERSTATE COMMERCE COMMISSION,
WASHINGTON.

I, JUDSON C. CLEMENTS, CHAIRMAN OF THE INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached paper is a true copy of an order entered by the Interstate Commerce Commission on November 12, 1910, In the Matter of the Investigation of Increases in Coal Rates by the Norfolk & Western Railway Company, Investigation and Suspension docket No. 26-A, involving rates on coal from producing points on the Norfolk & Western Railway in West Virginia to Lake ports for trans-shipment, covered by Supplement No. 21 to Norfolk & Western Railway Company tariff, I. C. C. No. 2787-B, and statement of the Norfolk & Western Railway Company in response to an order of the Interstate Commerce Commission entered on the 23rd day of December, 1910, in the same proceeding, the originals of which are on file in the office of this Commission, and that the above investigation is now pending before the Commission, in which the Wheeling & Lake Erie Railroad Company was made a party respondent and submitted its statement in accordance with the above last named order, and in which testimony was submitted on September 20-22, 1911, at Washington, D. C.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal of the Commission, this Twenty-sixth day of October, 1911.

(Seal.)

JUDSON C. CLEMENTS,
Chairman.

EXHIBIT "B."

INTERSTATE COMMERCE COMMISSION.

JOHN W. BOILEAU, in his own behalf and in behalf of shippers of Lake Coal from the Pittsburgh District, Pennsylvania, Complainant,

against

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY, THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, THE PITTSBURGH, YOUNGSTOWN & ASHTABULA RAILWAY COMPANY, PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY, PENNSYLVANIA COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Defendants.

Petition.

The petition of the above named complainant respectfully shows:

I.

That the complainant is a resident of the city of Pittsburgh, Pennsylvania, and maintains an office in the city of Pittsburgh, Pennsylvania, and is engaged in said city in the business of buying and selling coal lands and property for himself and others, and is interested and engaged as a stockholder and bondholder in various coal and coke producing companies operating in the vicinity of Pittsburgh, Pennsylvania, in the production and sale of coal, and all of the lands, both those under sale and those under operation in which he is interested as aforesaid, are directly affected by the excessive, unreasonable and discriminatory rates herein complained of; that this complainant files this petition in his own behalf and in

behalf of numerous owners of coal lands, coal operators and shippers of coal in the Pittsburgh district, by their consent and with their authority; and in behalf also of all owners, operators and shippers similarly situated with said owners, operators and shippers above referred to; that by the term "Pittsburgh district" mentioned above is meant that coal producing territory in and around the city of Pittsburgh, embraced within a radius of forty miles thereof.

II.

That each and all of the above named defendants are common carriers engaged in the transportation of passengers and property by continuous carriage or shipment, wholly by railroad, between points in different states of the United States, and particularly are engaged in the carriage of lake coal from shipping points in the above described Pittsburgh district in the state of Pennsylvania to Ashtabula Harbor in the state of Ohio and other ports on Lake Erie, from which further carriage is had by water to upper lake ports on the Great Lakes for ultimate destination at consuming points in the states to the north and northwest; and as such common carriers are subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto. That by lake coal, so designated herein, is meant coal intended for lake ports, to be there loaded into vessels for transshipment to other ports upon the Great Lakes. That the said The Pittsburg & Lake Erie Railway Company enters the said Pittsburgh District, and with its connection, The Lake Shore & Michigan Southern Railway Company, forms a through and continuous line of railway from various shipping points in the said Pittsburgh

District to Ashtabula Harbor in the state of Ohio on Lake Erie, where lake coal is carried, and there trans-shipped from cars and loaded into vessels for further movement by water to the upper Lake ports on Lake Superior and elsewhere upon the Great Lakes; that practically all the stock of the Pittsburg & Lake Erie Railroad Company is owned by The Lake Shore & Michigan Southern Railway Company, and the said last named company formulates, dictates and directs the policy and affairs of the said The Pittsburgh & Lake Erie Railroad Company. That the said Pittsburgh, Fort Wayne & Chicago Railway Company has its terminus in the city of Pittsburgh, and with its connection, The Pittsburgh, Youngstown & Ashtabula Railway Company, forms a through and continuous line of railway from the Pittsburgh District to said Ashtabula Harbor for the transportation of lake coal for trans-shipment, as hereinabove described; that said Pittsburgh, Fort Wayne & Chicago Railway Company connects with and receives from the Pennsylvania Railroad Company, which serves said Pittsburgh District, coal produced in said Pittsburgh District for transportation to Ashtabula Harbor for trans-shipment as above described; that practically all the common stock of the said The Pittsburgh, Youngstown & Ashtabula Railway Company is owned and held by the Pennsylvania Company, which last named company controls the policy and directs the affairs of the said The Pittsburgh, Youngstown & Ashtabula Railway Company; that the said Pittsburgh, Fort Wayne & Chicago Railway Company is operated under a perpetual lease by the Pennsylvania Company, which last named company exercises all the rights and powers of ownership over and controls the policy and directs the affairs of the Pittsburgh, Fort Wayne & Chicago Rail-

way Company; that the Pennsylvania Company is incorporated under the laws of the state of Pennsylvania and is a subsidiary corporation of the said The Pennsylvania Railroad Company, which last named company controls and directs the policy and business of said Pennsylvania Company, and that the purpose for which said Pennsylvania Company, was organized and is maintained is to manage in the interests of said The Pennsylvania Railroad Company the railroads running west from Pittsburgh and the connecting lines thereof extending west and south, which were previously owned, leased, controlled or operated by said The Pennsylvania Railroad Company; that The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company is one of the railroads running west from Pittsburgh so managed by The Pennsylvania Company as aforesaid, and traverses the Pittsburgh District, connecting with and delivering lake coal to the Pittsburgh, Ft. Wayne & Chicago Railway Company at or near the city of Pittsburgh, for carriage to Ashtabula Harbor.

III.

That the defendants exact for the transportation of lake coal in carloads from shipping points in the Pittsburgh District to ports on Lake Erie as follows:

From Pittsburg and the territory around said city embraced within a radius of forty miles thereof and known as the Pittsburgh District:

To	Route	Rate per ton	Distance	Rate per ton per mile
Ashtabula Harbor, O.,	Penna. Lines, P. & L. E.,	88 cts.	130 miles	6.77 mills
Ashtabula Harbor, O.,	L. S. & M. S.,	88 cts.	130 miles	6.77 mills

That each of said rates is excessive, unreasonable and unjust and in violation of the provisions of the act to regulate commerce, particularly section one thereof; and said rates are discriminatory and constitute an undue preference and advantage to the shippers of other localities over those of the said Pittsburgh District, and subject said Pittsburgh District to undue and unreasonable prejudice and disadvantage, and that reasonable, just and non-discriminatory and non-preferential rates from said shipping points in said Pittsburgh District to said point of trans-shipment would not exceed fifty cents per ton in carloads of lake coal.

IV.

That said rate of 88 cents per ton in carloads for lake coal from the Pittsburgh district to said port of Ashtabula Harbor on Lake Erie is excessive and unreasonable in and of itself, and greatly and unreasonably in excess of the cost of the transportation and yields a profit to the defendant carriers wholly out of proportion to the cost of service; that the rate per ton per mile of 6.77 mills is an unreasonable und unjust charge for the service and is largely in excess of the fair and average charge for similar service on the defendants' and other railroad lines; that said rate on lake coal, though the lake coal rate is always treated as a proportional of a through rate, is greatly in excess even of the ordinary rate on commercial coal for domestic consumption charged by other railroads for much longer hauls; that said rate is greatly in excess of the commercial rate charged by defendants themselves for similar or longer hauls from other districts; that other railroads carry lake coal from the Kanawha district in West Virginia to Toledo, Ohio, an average distance of three hundred

and fifty-one miles at a rate of 97 cents per ton in carloads, or 2.74 mills per ton per mile; that the rate in carloads per ton on lake coal from the Marrowbone district in Kentucky to Toledo, Ohio, a distance of four hundred and ninety miles is 97 cents per ton or 1.98 mills per ton mile; that the rate from the Fairmont district of West Virginia to Lorain, Ohio, a distance of two hundred and fifty-five miles, is 97 cents per ton for lake coal in carloads, or 3.80 mills per ton mile; that the rate from the New River district of West Virginia to Toledo, Ohio, for the same commodity in carloads is $1.12 per ton for a distance of four hundred and ninety miles or 2.28 mills per ton mile; that the rate from the Pocahontas district of West Virginia to Sandusky, Ohio, a distance of four hundred and sixty miles is $1.12 per ton for lake coal in carloads or 2.43 mills per ton per mile; and that the rates on lake coal from other West Virginia districts are similarly less per ton mile than the rate from said Pittsburgh district; that the defendants engaged in the movements of lake coal from the Pittsburgh district to the said port of Ashtabula Harbor on Lake Erie have a large volume of back haul of iron ore and other commodities, almost if not quite equal to the forward movement itself and upon equally as good rates, whereas in the transportation of coal from the said West Virginia and Kentucky districts there is no return freight and the carriers engaged in that trade are under the necessity of hauling back to the coal districts empty cars without any compensation whatever; that the rate on lake coal from the Pittsburgh district to Ashtabula Harbor has been steadily increased from time to time during the past ten years and that the train mile earnings, gross earnings per mile, and net earnings per mile of said de-

fendants has steadily increased; that as to the Pittsburgh and Lake Erie Railroad Company, of whose total freight tonnage eighty per cent. is of low grade commodities and fifty-four per cent. is of coal alone, it has made for the year 1910 gross earnings for its entire mileage of over $90,000.00 per mile, and net earnings of more than $52,000.00 per mile, its net earnings being greater than the gross earnings of the next largest earning railroad in the United States.

VI.

That the rates hereinabove mentioned as exacted for the transportation of lake coal in carloads over the defendants' lines of railway from said shipping points in said Pittsburgh district, Pennsylvania, to said lake port of Ashtabula Harbor for trans-shipment, were established and are now maintained in force and exacted by mutual agreement and concert of action by and among all the carriers named as defendants in this proceeding; that the rates hereinabove mentioned, exacted for the transportation of lake coal in carloads from the said Pittsburgh district to the said port of Ashtabula and also the rates charged from the above described coal districts of Kentucky and West Virginia were established and are now maintained in force and exacted by mutual agreement and concert of action by and among the defendants and certain other common carriers serving the said Kentucky and West Virginia districts, to-wit, The Chesapeake & Ohio Railway Company, The Norfolk & Western Railway Company, Louisville & Nashville Railroad Company, The Baltimore & Ohio Railroad Company, The Kanawha & Michigan Railway Company, and certain other railroads and their connections, all common carriers subject to the said act to regulate commerce; and that the rate on lake coal from said

Pittsburgh district fixed as a result of said combination and conspiracy when compared with the rate on lake coal from said West Virginia and Kentucky districts shows gross discriminations and inequalities, and that said defendants, in combination with the other railroads reaching said Kentucky and West Virginia districts as aforesaid and as participators in said conspiracy to fix the lake coal rates have unjustly discriminated and are discriminating against said Pittsburgh district and the shippers therein, and have subjected said district and the shippers therein to undue and unreasonable prejudice and disadvantage, and have given or participated in giving to the said Kentucky and West Virginia districts an undue and unreasonable preference and advantage over said Pittsburgh district.

VII.

That the coal operators, producers and shippers of coal hereinabove referred to in said Pittsburgh district are now engaged in mining, selling and shipping coal to various markets throughout the several states north, east, west and northwest, and a large portion of their shipments has been lake coal to said Lake Erie port of Ashtabula Harbor, for trans-shipment to ports on Lake Superior and other ports on the Great Lakes as hereinbefore described; that said operators, producers and shippers ship said coal from their respective mines in the Pittsburgh district in Pennsylvania to said port on Lake Erie over the lines of railway of defendants as aforesaid; that the northwest trade, designated as the lake trade, is of especial benefit to coal shippers of said district, in that lake coal is mined and shipped during the summer and early fall season, when there is not the demand for other coal, and the production of said lake

coal permits the operation of the mines during such seasons, thus reducing the operating cost and furnishing employment to the employes dependent upon said mines for their livelihood; that said lake coal shipments are especially desirable to railroad companies, since said coal moves in large quantities, frequently in train load lots, is easily and economically handled and the cars in which said shipments are made return laden with ore, and that the shipment of said lake coal in the summer and fall seasons as aforesaid affords opportunity for the continuous employment of the equipment of the railroads which are engaged in a large measure in the transportation of coal, thus making the lake coal business the most desirable of the traffic of such lines of railway. That the said coal producers, operators and shippers in said Pittsburgh district wish to increase their said business, but are prevented from so doing by the excessive and unreasonable rates on transportation hereinabove set forth and by the discriminations hereinabove described. That said operators, producers and shippers in said Pittsburgh district have from time to time during the past three years petitioned said defendant railroad companies for redress of their grievances and a discontinuance of the unjust discriminations above described, and for a reduction of the unreasonable and unjust rates hereinbefore mentioned, and have been from time to time during the period aforesaid promised relief by said defendants, but such relief has been refused them, and a readjustment of said unreasonable rates has not been made.

VIII.

That the said operators, producers and shippers of lake coal in said Pittsburgh district, are obliged to compete and do compete with shippers of lake coal in said Kentucky and West Virginia districts above described; that the cost of producing coal shipped from the Pittsburg district as aforesaid, is much greater than the cost of producing the coal shipped from points within the states of West Virginia and Kentucky at the mines in said Fairmount, Kanawha, New River and Pocahontas districts and other districtsin Kentucky and West Virginia; that the average distance of the lake ports from the shipment points in said Kentucky and West Virginia districts is greater than the average distance to the lake ports serving the Pittsburgh district, but that this difference in distance in favor of coal shipped from the Pittsburgh district is more than off-set by the discriminations in rates and difference in cost of production as above set forth, and that as a consequence the said shippers of coal in the said Pittsburgh district are unable to compete successfully at ultimate destination points with other coal producers of said West Virginia and Kentucky districts, and are deprived of the benefits they would receive from the natural advantage of owning and operating coal mines located much nearer to said lake ports than are the coal mines of their said competitors in West Virginia and Kentucky.

IX.

That as a direct consequence of the excessive rates exacted and discriminations practiced by the defendants as above set forth, the normal increase of tonnage on lake coal produced in said Pittsburgh district of Pennsylvania and shipped to Lake Erie ports, has been re-

tarded, while during the same time the tonnage of coal produced in Kentucky and West Virginia and shipped to the said several lake ports has increased in great volume and out of all proportion to the normal increase, had no such excessive rates been established or maintained or such discriminations practiced.

X.

That by reason of the premises the defendants are and each of them is subjecting the said owners, producers, operators and shippers of coal in the said Pittsburgh district of Pennsylvania to the payment of unreasonable and unjust rates of transportation and said defendants are subjecting said owners, producers, operators and shippers in said Pittsburgh district, and the shippers and the general public located at and in the vicinity of said shipping points in said Pittsburgh district of Pennsylvania and at the consuming or destination points in other states to undue and unreasonable prejudice and disadvantage and giving to the coal producers, operators and shippers and the members of the general public located at the various coal districts above referred to in West Virginia and Kentucky, undue and unreasonable preference and advantage in violation of the provisions of the Act to regulate commerce, particularly sections 1 and 3 thereof.

Wherefore, complainant prays that the defendants may be severally required to answer the charges herein; that, after due hearing and investigation, an order be made commanding said defendants and each of them, to cease and desist from the aforesaid violations of the act to regulate commerce, and apply as maximum rates in the future for the transportation of lake coal (that is, coal destined for trans-shipment from ports on the

Great Lakes), in carloads from said shipping points in the Pittsburgh district in the state of Pennsylvania to said port of trans-shipment at Ashtabula Harbor, in the state of Ohio, such rates of transportation as the Commission may deem reasonable and just and that such other and further order or orders may be made as the Commission may consider proper in the premises or as the complainant's cause may appear to require.

JOHN W. BOILEAU,

Address: Park Bldg., Pittsburgh, Pa.

Dated at Pittsburgh, Pa., Feb. 15, 1911.

WADE H. ELLIS,
Attorney for Petitioner.
Address: 611 Fourteenth St., N. W.,
Washington, D. C.
ELLIS & DONALDSON,
CHALLEN B. ELLIS,
Of Counsel.

INTERSTATE COMMERCE COMMISSION,
WASHINGTON.

I, JUDSON C. CLEMENTS, CHAIRMAN OF THE INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached paper is a true copy of the petition in the case of John W. Boileau, in his own behalf and in behalf of the shippers of Lake coal from the Pittsburg district in Pennsylvania, against the Pittsburg & Lake Erie Railroad Company and others, docket No. 3853, the original of which is now on file in the office of this Commission, in which proceeding Henry W. McMaster and Francis H. Skelding, as Receivers of The Wabash Pittsburg Terminal Railway Company, have filed intervening petitions, and which was partly heard on April 24-26, 1911, at Washington, D. C.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal of the Commission, this Twenty-fifth day of October, 1911.

(Seal.) JUDSON C. CLEMENTS,
Chairman.

EXHIBIT "C."

No. 4116.

INTERSTATE COMMERCE COMMISSION.

THE PITTSBURGH VEIN OPERATORS' ASSOCIATION OF OHIO,
COMPLAINANT,

vs.

PENNSYLVANIA COMPANY, THE PENNSYLVANIA RAILROAD COMPANY,
DEFENDANTS.

Petition.

The petition of the above named complainant respectfully shows:

I.

That complainant is a voluntary association of operators in the No. 8 or Pittsburg vein of coal in the State of Ohio, the members of which own, control and operate sixty-five (65) coal mines in said vein of coal in the State of Ohio, and produce and sell approximately 9,000,000 tons of coal per year; that the place of business of said association is at the Schworm Building, in the City of Massillon and State of Ohio; and that complainant files this petition in its own behalf and in behalf of its various constituent members, whose business is directly affected by the excessive, unreasonable, discriminatory and preferential rates hereinafter complained of.

II.

That said The Pennsylvania Railroad Company is a corporation organized and existing under and by virtue

of the laws of the State of Pennsylvania; that the said Pennsylvania Company is a corporation also organized and existing under and by virtue of the laws of the State of Pennsylvania and is a subsidiary corporation of said The Pennsylvania Railroad Company, which last named Company controls and directs the policy and business of the said Pennsylvania Company, and that the purpose for which the said Pennsylvania Company was organized and is maintained is to manage in the interests of said The Pennsylvania Railroad Company certain railroads running west and south from Pittsburg, which said railroads prior to the organization of the said Pennsylvania Company were owned, leased, controlled or operated by said The Pennsylvania Railroad Company; that said The Cleveland & Pittsburg Railroad Company is a corporation, organized and existing under and by virtue of the laws of the State of Ohio and is one of said railroads running west from Pittsburg, so managed by the said Pennsylvania Company as aforesaid; that said The Cleveland & Pittsburg Railroad Company is operated under a perpetual lease made and executed by said The Cleveland & Pittsburg Railroad Company to said The Pennsylvania Railroad Company, and by said The Pennsylvania Railroad Company assigned to said Pennsylvania Company; that the line of railroad of said The Cleveland & Pittsburg Railroad Company serves, among other localities, a portion of said No. 8 coal field in the State of Ohio, and extends also to the port of Cleveland, Ohio.

That each and all of the above named defendants are common carriers engaged in the transportation of passengers and property by continuous carriage or shipment, wholly by rail, between points in the differem

States of the United States; that said defendants and each of them are also engaged as common carriers in connection with various and sundry water carriers in the transportation of property, partly by railroad and partly by water, between points in the different States of the United States and between points in a State of the United States and a foreign country, to-wit, the Dominion of Canada; that said defendants and each of them are engaged in the transportation of property shipped from a place in the United States to a foreign country, and carried from such place in the United States to a port of trans-shipment; that especially said defendants and each of them are and at all times hereinafter mentioned have been engaged in the carriage and transportation of lake cargo coal from the No. 8 field in the Counties of Harrison, Jefferson and Belmont in the State of Ohio, to the port of Cleveland, located on the southern shore of Lake Erie, in the State of Ohio, which said lake cargo coal at said port of Cleveland has been and now is transferred to lake vessels and has been and now is carried on said lake vessels to points in other States of the United States and to points in a foreign country, to-wit, the Dominion of Canada; that said coal so shipped from said mines to said port of Cleveland for trans-shipment by water in the manner hereinbefore described, is and for a long time has been transported by said defendants and each of them, under an arrangement by the terms of which said defendants agree to transport said coal in car load lots from said mines to said port of Cleveland, and there to unload the same upon vessels to be supplied at said port by said shippers for the reception of said coal, and there distribute or trim said coal in the holds of said vessels, it being understood that said shippers

will furnish lake vessels for the further transportation of said coal by water to points in other States of the United States and to points in the Dominion of Canada; that said railroads and each of them are, therefore, as such common carriers, subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof and supplementary thereto.

III.

That on the 10th day of May, 1910, this petitioner filed a certain complaint with the Railroad Commission of Ohio against the Wheeling & Lake Erie Railroad Company and B. A. Worthington, Receiver of said The Wheeling & Lake Erie Railroad Company, in which said complaint the rates and charges imposed by said Receiver and said Company on said lake cargo coal transported by said Receiver and said Company, from said No. 8 field to the ports of Huron and Cleveland, both in the State of Ohio, for transshipment by lake vessels, as aforesaid, were alleged to be unreasonable and unjust, and in which complaint relief from said unjust and unreasonable charges was sought for and asked from said Railroad Commission of Ohio; that later an amended complaint was filed with said Railroad Commission of Ohio, and in due time an answer was filed to said amended complaint by said defendants therein, and that after a hearing before said Railroad Commission of Ohio, in which all parties to said proceeding introduced evidence at length, and after listening to arguments therein and upon due consideration thereof, said Railroad Commission of Ohio on the 28th day of February, 1910, made and entered an order reducing the rate on said lake cargo coal; that thereafter, on the 28th day of March, 1910,

said B. A. Worthington, as Receiver of The Wheeling & Lake Erie Railroad Company, filed a bill in equity in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, complaining of said order of said Railroad Commission of Ohio as an unlawful interference with the interstate commerce engaged in by said B. A. Worthington, Receiver of said The Wheeling & Lake Erie Railroad Company; that in due time an answer in behalf of the Railroad Commission of Ohio was filed in said court to said complaint, and to said answer replication was made; that said cause came on for hearing before said court and said court, after due consideration, found the allegations in said bill of complaint with reference to the character of the traffic or services affected by the order of the Railroad Commission of Ohio to be correct, and found that said traffic or services constituted interstate commerce and thereupon enjoined said Railroad Commission of Ohio from enforcing the terms of said order, said court inclining to the belief and so stating it in his opinion, that the traffic in question was "subject only to the authority of the Interstate Commerce Commission;" that thereafter an appeal was prosecuted from the said order of said court to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, and that on the 2nd day of May, 1911, said Circuit Court of Appeals for the Sixth Circuit affirmed the order and decree of said Circuit Court for the Northern District of Ohio, Eastern Division, on the ground that the traffic or services affected by the order of the Railroad Commission of Ohio, constituted interstate commerce, subject only to regulation by the federal government, said Circuit Court of Appeals also stating in the opinion handed down in said

cause, that the Interstate Commerce Commission had control over the traffic or services under consideration.

IV.

That there are a large number of coal mines owned and operated by the constituent members of your complainant, which are located on and served by said defendants in Jefferson, Harrison and Belmont counties, in the State of Ohio, from which mines many thousand tons of coal per annum are loaded and transferred over the lines of said defendants to said port of Cleveland for trans-shipment by vessel to other points without the State of Ohio, in the manner hereinbefore described; that the distance from said mines in said No. 8 field served by said defendants, to said port of Cleveland, is one hundred and twenty-five (125) miles; that for transporting said coal to said port of Cleveland said defendants demand, charge and collect the sum of Eighty-five Cents ($.85) per ton in carload lots; that said rate or charge of Eighty-five Cents ($.85) per ton is excessive, unreasonable and unjust and in violation of the provision of the act to regulate commerce, and is particularly violative of Section 1 of said act; that said rate or charge of Eighty-five Cents ($.85) per ton is discriminatory and is such as to give to the coal shippers of other localities an undue preference and advantage over those in the No. 8 coal district; that said rate subjects said No. 8 coal district and the shippers therein, to undue and unreasonable prejudice and disadvantage.

V.

That said rate or charge of Eighty-five Cents ($.85) per ton is excessive and unreasonable in and of itself, and is unreasonably in excess of the cost of performing said

services for which said charge is made, and yields a profit to said defendants wholly out of proportion to the cost of the services rendered; that other railroads carry lake coal from the Kanawha coal district in the State of West Virginia to Toledo, Ohio, an average distance of three hundred and fifty-one (351) miles, at a rate of Ninety-seven Cents ($.97) per ton; from the Marrowbone district in Kentucky to Toledo, Ohio, a distance of four hundred and ninety (490) miles, for Ninety-seven Cents ($.97) per ton; from the Fairmont coal district in West Virginia to Lorain, Ohio, a distance of two hundred and fifty-five (255) miles, for Ninety-seven Cents ($.97) per ton; from the New River coal district in the State of West Virginia to Toledo, Ohio, a distance of four hundred and ninety (490) miles, for One and 12-100 Dollars ($1.12) per ton; from the Pocahontas coal district in the State of West Virginia to Sandusky, Ohio, a distance of four hundred and sixty (460) miles, for One and 12-100 Dollars ($1.12) per ton; and that the back haul of iron ore and other commodities from said port of Cleveland to the vicinity of said No. 8 coal field, for said coal cars is much greater on the line of road of defendants, than on the railroads hauling said lake cargo coal from said West Virginia and Kentucky coal fields; that a reasonable, just, nonpreferential and nondiscriminatory rate for the services rendered by said defendants in the transportation of said lake cargo coal from said No. 8 coal field to said port of Cleveland, would be less than forty-seven cents ($.47) per ton.

VI.

That said rate of eighty-five cents ($.85) per ton so charged and received for said transportation of lake cargo coal, was established and is now in force under

and pursuant to a mutual agreement and concert of action by and between said defendants and each of them, and certain other common carriers serving said Kentucky and West Virginia coal districts, to-wit, The Chesapeake & Ohio Railway Company, The Norfolk & Western Railway Company, The Louisville & Nashville Railroad Company, The Baltimore & Ohio Railroad Company, The Kanawha & Michigan Railway Company, and other railroads and their connections, all common carriers, subject to the said act to regulate commerce; that said rate on said lake cargo coal from said No. 8 field so fixed as a result of said combination and concert of action, grossly discriminates against and unduly prejudices said No. 8 coal shippers in said No. 8 coal district, to the favor and advantage of said West Virginia and Kentucky coal districts and the coal shippers therein.

VII.

That said lake cargo coal so shipped by rail and water, as aforesaid, meets in the northwestern States and in the Dominion of Canada with said coal so shipped and transported from said West Virginia and Kentucky coal fields and competes in said northwestern coal markets with said West Virginia and Kentucky coal; that the cost of producing said coal shipped from said No. 8 district is much greater than the cost of producing said West Virginia and Kentucky coals; that the average distance from the West Virginia and Kentucky coal fields to said ports on the southern shore of Lake Erie, from which said coal is trans-shipped by lake vessels to the northwest is much greater than the average distance from the No. 8 district to said port of Cleveland, but that the benefit which should result to said No. 8 coal district, because of its natural advantage in being in

close proximity to said lower lake ports, is more than offset by the discriminations and preferences in said rates in favor of said West Virginia and Kentucky districts, and in the added cost of production in said No. 8 field, and that, therefore, said No. 8 coal field, thus deprived of the benefit of its proximity to the lower lake ports, is unable to compete successfully at the ultimate points of destination of said coal, with said West Virginia and Kentucky coals, which latter coals, because of the excessive, preferential and discriminatory rates charge against said No. 8 coal, are supplying the market for said lake cargo coal to the disadvantage and exclusion of the said No. 8 coal.

VIII.

That within two years prior to the filing of this petition herein, plaintiff's various constituent members have shipped large quantities of said lake cargo coal from said No. 8 coal field to said port of Cleveland for transshipment by vessels to points in the United States, other than Ohio, and to points in the Dominion of Canada; that said rate or charge of eighty-five cents ($.85) per ton, demanded and collected by said defendants for the transportation of said coal so shipped by complainant's various members, became due and payable and was paid by said members on each ton of said coal so shipped by said members within said period of two years prior to the filing of this petition herein.

IX.

That by reason of the premises said defendants and each of them have been and now are subjecting said complainant and its constituent members, as owners, pro-

ducers, operators and shippers of coal in the said No. 8 coal district of Ohio, to the payment of unreasonable and unjust rates and charges, and have been and now are subjecting said complainant and its said members and the district in which they operate, to unreasonable prejudice and disadvantage, and have been and now are giving to said West Virginia and Kentucky coal districts and to the coal operators and shippers therein, an undue and unreasonable preference and advantage; that there is due the various members of plaintiff association from said defendants and each of them, large sums of money by way of reparation to and as damages due said members because of said overcharges in excess of said reasonable rate of forty-seven cents ($.47) per ton, which plaintiff claims in behalf of its said members.

WHEREFORE, your petitioner prays that the defendants and each of them may be required to answer the charges herein; that after due hearing and investigation, an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of the act to regulate commerce and to charge, demand and receive as a maximum rate in the future, for the transportation of said lake cargo coal in carload lots from said No. 8 field in the State of Ohio, to said port of Cleveland for trans-shipment by said lake vessels to points in other States and in the Dominion of Canada, such a rate as the Commission may deem reasonable, just, nondiscriminatory and nonpreferential; that said defendants and each of them be ordered and directed to pay to plaintiff's said members, by way of reparation and damages, as aforesaid, such sums of money as said members may be entitled to receive, and that the Com-

mission make such further order or orders as it may consider proper in the premises.

THE PITTSBURGH VEIN OPERATORS' ASSOCIATION OF OHIO,

By M. D. RATCHFORD,
Secretary.

Address: Schworm Building, Massillon, Ohio.

M. B. & H. H. JOHNSON,
Attorneys for Petitioner.

Address: 1009 American Trust Bldg., Cleveland, Ohio.

T. H. HOGSETT,
Of Counsel.

No. 4116, Sub. 1.

INTERSTATE COMMERCE COMMISSION.

THE PITTSBURGH VEIN OPERATORS' ASSOCIATION OF OHIO,
COMPLAINANT,

vs.

THE WHEELING AND LAKE ERIE RAILROAD COMPANY and B. A. WORTHINGTON, Receiver of The Wheeling and Lake Erie Railroad Company,
DEFENDANTS.

Petition.

The petition of the above named complainant respectively shows:

I.

That the complainant is a voluntary association of operators in the No. 8 or Pittsburgh vein of coal in the State of Ohio, the members of which own, control and operate sixty-five (65) coal mines in said vein of coal in the State of Ohio, and produce and sell approximately 9,000,000 tons of coal per year; that the place of business of said association is at the Schworm Building, in the city of Massillon, and State of Ohio; and that complainant files this petition in its own behalf and in behalf of its various constituent members, whose business is directly affected by the excessive, unreasonable, discriminatory and preferential rates hereinafter complained of.

II.

That said defendant, The Wheeling and Lake Erie Railroad Company is a corporation organized and exist-

ing under and by virtue of the laws of the State of Ohio and that the said defendant, B. A. Worthington, Receiver of said company is duly appointed, qualified and acting as such receiver, under and by virtue of an appointment made by the United States Circuit Court for the Northern District of Ohio, Eastern Division, on the 8th day of June, 1908, in the case of The National Car Wheel Company vs. The Wheeling and Lake Erie Railroad Company, consolidated with The Central Trust Company of New York, Trustee, vs. The Wheeling and Lake Erie Railroad Company, being cause No. 7359 in Equity, consolidated with cause No. 7603.

That said defendant, The Wheeling and Lake Erie Railroad Company, is the owner of a line of railroad located in the State of Ohio, and prior to the appointment of said Receiver operated said railroad and was a common carrier engaged in connection with other common carriers in the transportation of passengers and property, wholly by railroad, between points in the different States of the United States and between points in the United States and an adjacent foreign country, to-wit, the Dominion of Canada, and that prior to the appointment of said Receiver, said defendant, The Wheeling and Lake Erie Railroad Company was also engaged as a common carrier in connection with various and sundry water carriers in the transportation of property, partly by railroad and partly by water, under the conditions and arrangements hereinafter described and referred to, between points in the different States of the United States and between points in a State of the United States and a foreign country, to-wit, the Dominion of Canada; that said B. A. Worthington, Receiver of said The Wheeling and Lake Erie Railroad Company is now and

has since his said appointment as said receiver, been in possession and control of said property of said Railroad Company and since said appointment has been and now is a common carrier engaged in the transportation of passengers and property over the lines of said railroad in the same manner as said The Wheeling and Lake Erie Railroad Company operated said railroad, as hereinbefore described, prior to the appointment of said Receiver; that prior to the appointment of said Receiver said The Wheeling and Lake Erie Railroad Company was and since the appointment of said Receiver, said Receiver has been and now is engaged in the transportation of property shipped from a place in the United States to a foreign country, and carried from such place in the United States to a port of trans-shipment; that especially prior to the appointment of said Receiver, said The Wheeling and Lake Erie Railroad Company had been, and since the appointment of said Receiver, said Receiver has been and now is, engaged in the carriage and transportation of coal from the No. 8 field in the counties of Harrison, Jefferson and Belmont, in the State of Ohio, to certain ports on the southern shore of Lake Erie, to-wit, the ports of Huron and Cleveland, both located within the State of Ohio, which said coal at said ports of Huron and Cleveland has been and now is transferred to lake vessels, and has been and now is carried on said lake vessels to points in other States of the United States and to points in a foreign country, to-wit, the Dominion of Canada; that said coal so shipped from said mines to said lower lake ports for trans-shipment by water in the manner hereinbefore described, is and for a long time has been transported by said defendants and each of them, under a contract of

carriage, by the terms of which said defendants and each of them agree to transport said coal in car-load lots from said mines to said lower lake ports of Huron and Cleveland, and there unload the same upon vessels to be supplied at said ports by said shippers for the reception of said coal, and there distribute said coal in the holds of said vessels, in return for which said shippers agree to pay said defendants at the rate of ninety cents ($.90) per ton, for all of said services so performed by said defendants, it being further understood that said shippers will furnish lake vessels for the transportation of said coal by water to points in other States of the United States and to points in the Dominion of Canada.

That said railroad and said Receiver, and each of them, is, therefore, as such common carrier, subject to the provisions of the act to regulate commerce, approved February 4th, A. D., 1887, and acts amendatory thereof and supplementary thereto.

III.

That on the 10th day of May, 1909, this petitioner filed a certain complaint with the Railroad Commission of Ohio against said The Wheeling and Lake Erie Railroad Company and said B. A. Worthington, Receiver of said The Wheeling and Lake Erie Railroad Company, in which said complaint the rates and charges herein complained of were alleged to be unreasonable and unjust, and in which complaint relief from said unjust and unreasonable charges was sought for and asked from said Railroad Commission of Ohio; that later an amended complaint was filed with said Railroad Commission of Ohio, and in due time an answer was filed to said amended complaint by said defendants, and that after a hearing before said Railroad Commission of Ohio, in which

all parties to said proceeding introduced evidence at length, and after hearing arguments therein, and upon due consideration said Railroad Commission of Ohio, on the 28th day of February, 1910, made and entered an order requiring said The Wheeling and Lake Erie Railroad Company and said B. A. Worthington as Receiver thereof to thereafter charge for said transportation and unloading services the sum of Seventy Cents (70c) per ton f. o. b. vessel, in carload lots, which rate said Railroad Commission of Ohio found to be a just and reasonable rate; that thereafter on the 28th day of March, 1910, said B. A. Worthington as Receiver of The Wheeling and Lake Erie Railroad Company filed a bill in equity in the Circuit Court of the United States for the Northern District of Ohio and Eastern Division thereof, complaining of said order of said Railroad Commission of Ohio as an unlawful interference with the Interstate Commerce engaged in by said B. A. Worthington, Receiver, and said The Wheeling and Lake Erie Railroad Company; that in due time an answer in behalf of the Railroad Commission of Ohio, was filed in said court to said complaint, and to said answer replication was made; that said cause came on for hearing before said court and said court after due consideration found the allegations in said bill of complaint with reference to the character of the traffic or services affected by the order of the Railroad Commission of Ohio to be correct and found that said traffic or services constituted Interstate Commerce and that said order was an unlawful interference with said Interstate Commerce and thereupon enjoined said Railroad Commission of Ohio from enforcing the terms of said order, said court inclining to the belief and so stating it in his opinion, that the traffic in

question was "subject only to the authority of the Interstate Commerce Commission;" that thereafter an appeal was prosecuted from the said order of said court to the United States Circuit Court of Appeals for the Sixth Circuit sitting at Cincinnati, Ohio, and that on the 2nd day of May, 1911, said Circuit Court of Appeals for the Sixth Circuit affirmed the order and decree of said Circuit Court for the Northern District of Ohio, Eastern Division, on the ground that the traffic or services affected by the order of the Railroad Commission of Ohio constituted interstate commerce, subject only to regulation by the Federal Government, said Circuit Court of Appeals also stating in the opinion handed down in said cause that the Interstate Commerce Commission had control over the traffic or services under consideration.

IV.

That there are sixteen (16) coal mines owned and operated by the constituent members of your complainant, which are located on and served by said Railroad and said Receiver in Jefferson and Harrison counties, in the State of Ohio, from which mines approximately 500,000 tons of coal per annum are loaded and transferred over the lines of said Railroad to said lower lake ports, for trans-shipment by vessel to other points without the State of Ohio, in the manner hereinbefore described; that the average distance from said mines in said No. 8 field, by the line of said Railroad to said port of Cleveland is 128 miles, and the average distance to said port of Huron is 149 miles; that for transporting said coal to each of said ports of Huron and Cleveland, and for unloading the same into said vessels for trans-shipment, as aforesaid, said defendant Receiver demands and charges and collects for said transporting and unload-

ing, the sum of Ninety Cents ($.90) per ton, in carload lots; that said rate or charge of Ninety Cents ($.90) per ton is excessive, unreasonable and unjust and in violation of the provisions of the act to regulate commerce, and is particularly violative of section 1 of said act; that said rate or charge of Ninety Cents ($.90) per ton is discriminatory and is such as to give to the coal shippers of other localities an undue preference and advantage over those in the No. 8 coal district; that said rate subjects said No. 8 coal district to undue and unreasonable prejudice and disadvantage.

V.

That said rate or charge of Ninety Cents ($.90) per ton f. o. b. vessel is excessive and unreasonable in and of itself, and is unreasonably in excess of the cost of performing said services for which said charge is made, and yields a profit to said defendants wholly out of proportion to the cost of the services rendered; that other railroads carry lake coal from Kanawha coal district in the State of West Virginia, to Toledo, Ohio, an average distance of Three hundred and Fifty-one (351) miles, at a rate of Ninety-seven cents ($.97) per ton; from the Marrowbone coal district in Kentucky to Toledo, Ohio, a distance of four hundred and ninety (490) miles, for Ninety-seven cents ($.97) per ton; from the Fairmont coal district in West Virginia to Lorain, Ohio, a distance of two hundred and fifty-five (255) miles, for Ninety-seven ($.97) per ton; from the New River coal district in the State of West Virginia to Toledo, Ohio, a distance of four hundred and ninety (490) miles, for One Dollar and twelve cents ($1.12) per ton; from the Pocahontas coal district in the State of West Virginia to Sandusky, Ohio, a distance of four hundred and sixty (460) miles, for

One Dollar and twelve cents ($1.12) per ton; that said other railroads and each of them, also make an additional charge of Five cents ($.05) per ton for unloading or transfering said coal from the cars of said railroads to said vessels at said points of transfer at Toledo, Lorain and Sandusky; and that the back haul of iron ore and other commodities from the lower lake ports, for said coal cars is much greater on the line of defendant Railroad than on the railroads hauling said lake coal from said West Virginia and Kentucky coal fields; that so-called railway fuel coal, which is identical in every way with said lake cargo coal, is hauled by said defendants from said No. 8 field to Toledo, under conditions substantially the same as those surrounding the transportation of said lake cargo coal, at a rate of Seventy-two and one-half cents (72½c) per ton for a haul of about two hundred (200) miles; that a reasonable, just, non-preferential and non-discriminatory rate for the services rendered by said defendants in the transportation of said lake cargo coal from said No. 8 coal field to said points of Huron and Cleveland and the transferring of said coal to said lake vessels at said points, by said defendants would be less than fifty-two cents ($.52) per ton, f. o. b. vessel.

VI.

That said rate of ninety cents ($.90) per ton f. o. b. vessel, so charged and received for said transportation and unloading as aforesaid, was established and is now in force under and pursuant to a mutual agreement and concert of action by and between said defendant railroad and said Receiver and certain other common carriers serving the said Kentucky and West Virginia coal districts, to-wit, The Chesapeake & Ohio Railway Com-

pany, The Norfolk & Western Railway Company, The Louisville & Nashville Railroad Company, The Baltimore & Ohio Railroad Company, The Kanawha & Michigan Railway Company and certain other railroads and their connections, all common carriers, subject to the said act to regulate commerce; that said rate on said lake coal from said No. 8 field, so fixed, as a result of said combination and concert of action, grossly discriminates against and unduly prejudices said No. 8 coal shippers and said No. 8 coal district, to the favor and advantage of said West Virginia and Kentucky coal districts and the coal shippers therein.

VII.

That said lake cargo coal so shipped by rail and water, as aforesaid, meets in the northwestern States and in the Dominion of Canada with said coal so shipped and transported from said West Virginia and said Kentucky coal fields, and competes in said northwestern coal markets with said West Virginia and Kentucky coal; that the cost of producing said coal shipped from said No. 8 district, as aforesaid, is much greater than the cost of producing said West Virginia and Kentucky coals; that the average distance from the West Virginia and Kentucky coal fields to the said lower lake ports is much greater than the average distance from the No. 8 district to said lower lake ports, but that the benefit which should result to said No. 8 coal district because of its natural advantage in being in close proximity to said lower lake ports, is more than offset by the discriminations in said rates in favor of said West Virginia and Kentucky districts and in the added cost of production

in said No. 8 field, and that therefore said No. 8 coal field, thus deprived of the benefit of its proximity to the lower lake ports, is unable to compete successfully at the ultimate points of destination of said coal, with said West Virginia and Kentucky coals, which latter coals, because of the excessive and discriminatory rates charged against said No. 8 coal, are supplying the market for said lake cargo coal to the disadvantage and exclusion of said No. 8 coal.

VIII.

That within two years prior to the filing of this petition herein, plaintiff's various constituent members have shipped large quantities of said lake cargo coal from said No. 8 coal field to said ports of Huron and Cleveland for trans-shipment by vessels to points in the United States other than Ohio and to points in the Dominion of Canada; that said rate or charge of 90 cents per ton f. o. b. vessel, demanded and collected by said defendants for said services became due and payable and was paid by plaintiff's said members for the transportation of each and every ton of said lake coal so shipped within said period of two years prior to the filing of this petition herein.

IX.

That by reason of the premises, said defendant Railroad and said defendant Receiver, and each of them, have been and now are subjecting the said complainant and its constituent members, as owners, producers, operators and shippers of coal in the said No. 8 coal district of Ohio, to the payment of unreasonable and unjust rates

and charges, and have been and now are subjecting said complainant and its said members and the district in which they operate, to unreasonable prejudice and disadvantage, and have been and now are giving to the West Virginia and Kentucky coal districts and to the coal operators and shippers therein, an undue and unreasonable preference and advantage; that there is due the various members of plaintiff association from said defendants, and each of them, large sums of money, by way of reparation to and as damages due said members, because of said overcharges in excess of said reasonable rate of Fifty-two cents ($.52) per ton f. o. b. vessel which plaintiff claims in behalf of said members.

WHEREFORE your petitioner prays that the defendants may be required to answer the charges herein and that after due hearing and investigation, an order be made commanding the defendants and each of them to cease and desist from the aforesaid violations of the act to regulate commerce and to charge, demand and receive as a maximum rate in the future for the transportation of said lake cargo coal in carload lots, from said No. 8 field in the State of Ohio, to said ports of Huron and Cleveland, and the unloading of the same at said ports on said lake vessels for trans-shipment by said vessels to points in other States and in the Dominion of Canada, such a rate as the Commission may deem reasonable, just, nondiscriminatory and nonpreferential; that said defendants and each of them be ordered and directed to pay to plaintiff's said members by way of reparation and damages as aforesaid such sums of money as said members may be entitled to receive, and that the Com-

mission make such further order or orders as it may consider proper in the premises.

THE PITTSBURGH VEIN OPERATORS' ASSOCIATION OF OHIO.

By M. D. RATCHFORD,
Secretary.

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T. H. HOGSETT,
Of Counsel.

INTERSTATE COMMERCE COMMISSION,

WASHINGTON.

I, JUDSON C. CLEMENTS, CHAIRMAN OF THE INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached papers are true copies of the original petitions in the cases of The Pittsburg Vein Operators' Association of Ohio vs. Pennsylvania Company and others, docket No. 4116, and The Pittsburg Vein Operators' Association of Ohio vs. The Wheeling & Lake Erie Railroad Company, filed as Sub No. 1 to the case of The Pittsburg Vein Operators' Association of Ohio vs. Pennsylvania Company and others, the originals of which are now on file in the office of this Commission, which proceedings are now pending before the Commission, in which no testimony has been submitted.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal of the Commission, this Twenty-fifth day of October, 1911.

(Seal.) JUDSON C. CLEMENTS,
Chairman.